No. 3253

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PRESIDIO MINING COMPANY (a corporation), WM. S. NOYES, B. S. NOYES, L. OSBORN, JOHN W. F. PEAT and L. M. DOHERTY,

Appellants,

vs.

W. S. OVERTON and CARL A. MARTIN, on behalf of themselves and other minority stockholders of the Presidio Mining Company named in this Complaint,

Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

Appellants devote the first thirty-six pages of their brief to a "General Statement of the Litigation." We controvert said statement because of its prolixity, and its argumentative and complex character. We present herewith our own statements in concise form, to permit this court to have the main facts as to time, place, circumstances and parties before it. In our argument we shall analyze the evidence and proceedings fully.

Statement of the Case.

The present appeals grow out of a stockholders' suit charging fraud and other wrongful acts, brought by two minority stockholders on behalf of themselves and any others who might desire to unite, against the corporation and the individual defendants holding its majority stock and controlling the corporation adversely to minority stockholders. Complainants seek to recover for the corporation:

Section 5;

Moneys paid on Section 5 account;

Moneys stolen from the corporation by L. Osborn;

Return of excessive salaries;

Any and all illegal profits made from or through company business, directly or indirectly, by any or all of the individual defendants;

For an accounting and judgment according to the equities thereupon appearing;

For injunctive relief and a receivership.

The suit was begun July 26, 1915, partially tried in March, 1916, examination of company books then ordered by the trial court, report of auditors filed, trial concluded and case argued August 29, 1916; briefs thereafter filed, and case submitted for decision December 2, 1916; oral opinion of the court rendered December 3, 1917; motion to reopen case, with answer, filed, argued, and denied; interlocutory decree filed February 16, 1918; ob-

jections to appointment of receiver, with replies, heard and objections overruled; receiver appointed, the order appointing receiver being filed February 20, 1918; receiver took over company business in San Francisco, February 23, 1918, and after ancillary proceedings in Texas, the company business, property, and Section 5 in that state on March 5, 1918.

The interlocutory decree adjudges in complainants' favor:

That the individual defendants were guilty of conspiracy and fraud against the company and its minority stockholders;

That Wm. S. Noyes illegally obtained benefits for himself while in a fiduciary relation to the company;

That Osborn, the secretary, had embezzled the company funds;

That various resolutions and transactions had and entered into by the individual defendants during the period of their majority control were fraudulent, illegal and void;

That Wm. S. Noyes wrongfully acquired Section 5; that he is a trustee therefor and the Presidio Mining Company the rightful owner, subject to the payment to Wm. S. Noyes, of its purchase price;

That corporation manipulations were handled by Wm. S. Noyes as the dominant control, acquiesced in by the other individual defendants; that thereby the company was defrauded by said

majority control, to its detriment and to the detriment of the minority stockholders.

That Wm. S. Noyes on getting the control of Section 5 then drew a lease between himself, in effect, and the corporation, for which he had the "bonus resolution" drawn giving him $45,000 for obtaining said lease, $11,000 payable forthwith; that this sum was used by him under the guise of a loan to Osborn for money stolen by Osborn from the company amounting to $10,689.75, taking Osborn's promissory note secured by his stock. The decree requires the deposit of the Osborn note with the clerk of the court, as well as all the stock originally held by Osborn.

An accounting was ordered and the matter referred to the standing Master in Chancery.

From the interlocutory decree and order appointing receiver appeals were taken; no supersedeas bond has been filed, and the receiver has conducted the mining operations since his appointment.

By stipulation, both appeals are to be heard on the one transcript.

Statement of Facts.*

* Record references to each of these facts appear in the argument.

The Presidio Mining Company is a California Corporation incorporated in 1883, now capitalized at $150,000.00, with 150,000 shares, par value $1.00 each. About two-thirds of its capital stock is held

by defendants. It has its home office in San Francisco. It owns and operates a lead-silver mine comprising Section 8, in Shafter, Presidio County, Texas.

Wm. S. Noyes and L. Osborn have been connected with the said company since its organization. Wm. S. Noyes continuously since organization, and until the receiver took charge, had sole charge of mining operations at Shafter, residing there up to 1901. Since 1901 he has resided in Oakland. L. Osborn had, as secretary of the company, full charge of the San Francisco office for a number of years up to 1913; from January, 1913 to September 23, 1915 he retained his position as secretary, but did not have sole charge of the office of the company. John W. F. Peat was president from 1907 to 1913, then assistant secretary and later secretary.

On December 1, 1912, Wm. S. Noyes owned only 1382 shares of stock; L. Osborn was the largest stockholder and had 57,213-1/3 shares in his own name and held 2331½ shares as trustee; L. M. Doherty had standing in her name as the agent of India Scott Willis 36,956⅔ shares. B. S. Noyes first became a stockholder in the early part of 1913. J. W. F. Peat had 10 shares.

In November, 1912, E. M. Gleim, in charge of the mine under Wm. S. Noyes, wrote to Noyes that the adjoining Section 5 was for sale. Wm. S. Noyes at once went to Ashland, Oregon, to see Benton Bowers and arranged for a loan of $10,000 to

assist in the purchase of Section 5. He returned the early part of December, 1912. On December 12, 1912, 28,607 shares of the Osborn stock were transferred to Noyes. December 16, 1912 Wm. S. Noyes went to Texas. He met his assistant Gleim at the Marfa railroad station, 45 miles from the mine. Wm. S. Noyes immediately arranged to borrow $10,000 from the Marfa National Bank. He and Gleim then obtained options on all but four shares of the Silver Hill Mill & Mining Company stock, a Texas corporation then owning Section 5, Harry Young, half owner, optioned his stock to Noyes for $10,000. They then went to the mine the latter part of December, 1912. Both Noyes and Gleim examined Section 5, with which Wm. S. Noyes was already familiar, he having formerly operated said section. They estimated the new ore body which had been recently opened up by the Lewissohn Brothers (in Stope 13) to be worth from $100,000 to $400,000. The ore was sampled in the office of the Presidio Mining Company, samples being taken and work done by company operatives under direction of Noyes and Gleim. All expenses in connection with the matter were paid by Presidio Mining Company. Wm. S. Noyes borrowed the $10,000 he had previously arranged for from the Marfa National Bank on his promissory note, depositing with said bank as collateral security the Osborn stock secured by him in December, 1912. The Presidio Mining Company's bank account was transferred during this period from the

San Antonio National Bank to said Marfa National Bank. Said Noyes likewise borrowed $10,-000 from Benton Bowers, pursuant to the prior arrangement. Benton Bowers was then and had been for many years the contractor hauling freight and wood for Presidio Mining Company.

All said borrowed moneys were deposited in the Marfa National Bank to the credit of Wm. S. Noyes, against which he drew his checks in payment for stock of the Silver Hill Mill & Mining Company, then owner of Section 5. He paid Harry Young $5000 in cash and gave him a promissory note for $5000. All Noyes' and Gleim's travel and other expenses were paid by Presidio Mining Company during these transactions.

In the meantime, arrangements had been made with John W. Kniffin to design and install a cyanide plant in place of the pan amalgamation mill. He arrived December 24, 1912, and finished his plans the early part of January, 1913.

January 23, 1913, Wm. S. Noyes wrote the Willis letter. By January 25, 1913 he had secured practically all of the Silver Hill stock. On said day he made a lease between the Silver Hill Mill & Mining Company, executed by directors he had installed (688), and Presidio Mining Company, executed by John W. F. Peat and L. Osborn, under the terms of which the Presidio Mining Company was to pay fifty cents per ton royalty on all ore extracted from Section 5 and reduced in Presidio

Mining Company's mill. This lease was sent from El Paso by Wm. S. Noyes to his brother, B. S. Noyes, then not connected with the company, with orders to have Osborn call the directors of the company together and enter into the lease, which was done January 29, 1913. According to the minutes said lease was ratified on behalf of Presidio Mining Company in San Francisco by the votes of Osborn, Peat, Gardiner and Herger, then directors. Nothing was stated at the meeting as to the ownership of Section 5. Gardiner and Herger were ignorant of Wm. S. Noyes' connection with this property. A resolution was also adopted authorizing Wm. S. Noyes to borrow $15,000 on the company's credit. The records purport to show that on said day director Fish was removed from office and his stock transferred to B. S. Noyes, who on said day was alleged to have been elected a director in Fish's place. On request, directors Gardiner and Herger immediately resigned, and on January 31, 1913, L. M. Doherty and Wm. S. Noyes were elected directors in their places, and Wm. S. Noyes was made vice president and general manager, at the same salary he had received as superintendent, namely, $450 a month.

In the meantime, operations had commenced on Section 5 under direction of Presidio Mining Company employees; Wm. S. Noyes immediately appointed E. M. Gleim superintendent at the mine, at a salary increase of $100 per month. All expenses for equipping Section 5 for facilitating the extrac-

tion of ores were paid by Presidio Mining Company.

On February 15th following, at the first meeting of the new board, all being present (consisting of the individual defendants in this case), they adopted a resolution awarding Wm. S. Noyes $45,000.00 as a bonus for obtaining said lease between Presidio Mining Company and Silver Hill Mill & Mining Company, Wm. S. Noyes not voting thereon, but being present at the meeting. At said meeting a resolution was likewise adopted giving Wm. S. Noyes full power to employ and discharge any employees or operatives of the company.

On February 21, 1913, L. Osborn executed a one-day promissory note for $10,689.75 to Wm. S. Noyes, and as collateral turned over to Noyes 25,000 shares of his stock. Said Osborn since 1906 had been systematically each month stealing the funds of the corporation. This sum of $10,689.75 was a portion of the amount Osborn was short in his accounts. Under the $45,000 bonus resolution, $11,000 was payable "forthwith" to Wm. S. Noyes. The said sum was withdrawn from the company in two checks drawn on the company's account in Wells Fargo Nevada National Bank, signed by B. S. Noyes and L. Osborn, payable to Wm. S. Noyes, one of $6000 Febuary 24, 1913, one of $5000 February 28, 1913, and a receipt for $11,000 dated February 27, 1913, signed by Wm. S. Noyes placed in the files of the corporation. The moneys were deposited in the Anglo London Paris National Bank to the

credit and in the account of Wm. S. Noyes (695). Noyes thereupon drew his check for $5000 on February 25th, and again on March 1, 1913, a further check for $5689.75 was drawn, both payable to Osborn (576). These two checks were cashed by L. Osborn and the money re-deposited to the credit of Presidio Mining Company in Wells Fargo Nevada National Bank. No corresponding entries of these deposits were made on the company's books, nor were the other stockholders notified of the shortage of Osborn, who was thereafter continued as director and secretary at a salary of $300 a month.

During this same period of time, 5926-5/6 shares of the stock held by Osborn, and also 5000 shares from the Willis stock, were transferred to B. S. Noyes. On March 12, 1913, B. S. Noyes appears on the books of the company as having 10,926-5/6 shares of the company's stock. He paid nothing for this stock. Osborn then had only 10 shares left in his possession, he having transferred the remaining 11 shares to Wm. S. Noyes. Subsequently the larger part of the stock holdings of the defendants, aggregating 87,883½ shares, was pooled in a voting trust controlled by Wm. S. Noyes and L. M. Doherty, to continue for approximately five years.

On April 2, 1913, a directors' meeting was held and B. S. Noyes was voted a salary of $150.00 a month as president, becoming retroactive from March 1, 1913. On May 26, 1913, Wm. S. Noyes secured the deed to Section 5 from Silver Hill Mill

& Mining Company trustees, he having dissolved the corporation in the meantime having acquired all its capital stock. The total amount paid by Noyes for said stock was $24,009.33.

On March 5th Wm. S. Noyes drew $5000 additional from the company under the bonus resolution, and continued to draw moneys thereunder during the year and also at the same time under the 50 cents per ton royalty arrangements of the January 25th lease.

On October 6, 1913, at the stockholders' meeting, defendants only being present, they voted to ratify all the acts and deeds of the directors and officers done and performed during the year 1913 prior to said meeting. The annual report for 1913 was sent to stockholders in October, in which it was mentioned that Section 5 was acquired by Wm. S. Noyes and "will" be operated by the company.

On November 19, 1913, Wm. S. Noyes without notice cancelled the original lease of January 25, 1913, and made a new contract with the corporation to work Section 5 on a pretended 50-50 basis.

During 1913, Wm. S. Noyes:

(1) Under the bonus resolution claims to have drawn $24,500 up to October 30th;

(2) Under the royalty arrangements drew $2003.60, up to October 30th;

(3) And pursuant to the November 19, 1913, contract, drew $3485.90 additional, making a total of $29,989.50 he claims he had drawn by the end of December, 1913.

This amount is subject to a deduction of $3500 under date of September 6, 1913, which he did not receive, making an actual total cash received in 1913 of $26,489.50. A receipt signed by Wm. S. Noyes evidencing an apparent payment of this $3500 to him was placed in the company files and entries concerning it were made on the company's books. The amount itself thus entered covered additional thefts by Osborn from the company. It was discovered by complainants after the final arguments and submission of the case in the trial court. The total thefts of Osborn thus far ascertained are $15,196.75, of which amount he repaid $1007 to the company in February, 1917 (375 to 392, 414).

Between January 1, 1913, and December 31, 1915, Wm. S. Noyes claims he had received $63,336.20 on Section 5 account, which said sum is subject to deduction of the $3500 item, making an actual total cash received of $59,836.20, in addition to his salary.

During the summer of 1913 the cyanide plant was put in operation, the change from the old method of pan amalgamation having been effected during the spring and early summer. In September negotiations were had to build an aerial tramway one mile to carry the ore from the mine to the mill. It was put into operation on March 1, 1914.

The salaries paid to the defendants were as follows: L. Osborn, $300 per month until September 23, 1915; Wm. S. Noyes, $450 per month; B. S. Noyes, $150 per month; John W. F. Peat as assistant secretary, $25 per month, and subsequently as secretary from September 23, 1915, $270 per month.

All defendants reside in San Francisco and Oakland, and are residents of the State of California. The complainants are residents of Maryland and Kansas respectively.

In March, 1915, complainant Overton came to San Francisco to the Exposition, and during said visit called on the officers of the Presidio Mining Company in San Francisco, and discussed with Wm. S. Noyes particularly the company affairs. He obtained from Wm. S. Noyes a letter of introduction to the superintendent at the mine, E. M. Gleim. On his homeward way to Maryland he visited the property. There he ascertained that the mine and equipment, and likewise Section 5, were all of considerable value. He also learned for the first time sufficient facts to give him some idea of the actual relations between Wm. S. Noyes and the Presidio Mining Company concerning said Section 5. He also was shown by the superintendent Gleim a copy of the annual report for 1914 just sent to stockholders, and learned that the company for the first time was in debt, although the last prior annual report of October, 1913, evidenced no such condition. He notified the superintendent that he had evidently been deceived by Noyes in San Francisco, and proposed to make an investigation of the corporation affairs. On return to his home in Maryland the early part of April he received a copy of the 1914 annual report, which showed an indebtedness by the company to Wm. S. Noyes of $42,-822.40 (Comp. Ex. 18, p. 2). He at once arranged

to return to San Francisco, arriving the early part of July, and began this litigation on July 26, 1915. Prior to the visit to San Francisco, the conversations with Wm. S. Noyes, and Osborn, and the return via the mine and information discovered in Texas, complainants had no knowledge of any wrongs whatsoever and no means of knowledge. They always had implicit confidence in the officers of the corporation and Wm. S. Noyes as superintendent. All annual reports had concealed from the stockholders what the defendants now claim was the true condition of the company.

The embezzlement of L. Osborn was not discovered by complainants until some time after the commencement of this suit. W. S. Overton at once initiated a criminal prosecution of Osborn. A warrant was issued for his arrest. In the meantime, on November 10, 1915, on complaint of a son of Osborn that his father was a chronic inebriate and there being no resistance thereto by said L. Osborn, he was placed in Agnews State Hospital for a term of two years. During said incarceration no criminal proceedings could be enforced. In the meantime the statute of limitations ran against the last known embezzlement of the series.

Two injunctions have issued in the case, one in December, 1915, preventing Wm. S. Noyes or any agent of his from drawing moneys on Section 5 account, and preventing the disposing or encumbering of said Section 5; the other in December, 1916, preventing the transfer of any of the original 59,-

554-5/6 shares of Osborn's stock, and impounding the same pending the further order of the court.

On December 3, 1917, after having the case under submission for one year, the court rendered its oral opinion in favor of complainants and against defendants. In announcing its decision the court stated in substance as follows:

That it was a voluminous case, and that the court had taken considerable time for consideration, and, owing to the pressure of criminal business it was better to announce its conclusions generally rather than render a written opinion under the circumstances;

That the court had taken occasion to carefully review the evidence in the case in its entirety, and likewise had very carefully considered the oral argument, the briefs and the authorities;

That its conclusions, arrived at reluctantly because of the fact of a finding of fraud upon the part of defendants, had been reached, however, in favor of the complainants' case;

That the court was satisfied from the evidence that the original acquisition of control of the company was through a fraudulent manipulation of the Osborn stock; that the Osborn shortage, came to the knowledge of Wm. S. Noyes as early as December, 1912; that he took advantage of it to secure from Osborn that stock without any real compensation, and by the use of the company funds in a manner that never resulted in the shortage being made good to it;

That this control of the corporation came absolutely within the hands of Wm. S. Noyes by a series of transactions that were not just and fair;

That the main matter for consideration in the case,—the acquisition in the name of Wm. S. Noyes of Section 5,—was enabled to be had by virtue of his getting control of the company and its board of directors; that while the transaction was not carried out in that form, it was nevertheless an acquisition of that property by funds of the company in fact; that Noyes alone, aside from his superintendent Gleim, was, of all the people connected with the company, fully cognizant of the character and value of Section 5; that while he manipulated the securing of the control of that section and its eventual transfer to his name by means which might upon their face have borne the impress of having been procured by funds other than those of the company, nevertheless he knew at the time he had potential control of the company and that he could procure the funds from the company with which to pay for Section 5; that he pursued a course which brought that result about. The incidental transaction known as the bonus resolution was with that object in view; first, to secure the means by which to manipulate the control of the Osborn stock, and, second, it enabled him to secure the funds of the company; that and the subsequent leasing of Section 5 to the corporation defendant enabled him to procure the means with which to pay every cent paid for Section 5;

That under these circumstances, equity, which looks to the substance and ignores the mere form in which a transaction is cast, will hold Section 5 to be in equity the property of the Presidio Mining Company;

That the entire transaction, from start to finish, after Noyes got control of the corporation affairs by getting a board of directors which was absolutely under his domination, convinced the court of a uniform and persistent manipulation of its affairs, in fraud of the rights of its minority stockholders and in fact in fraud of the rights of all excepting those who were in the transaction with Noyes; and the court regretted very much to have to find that the real nature of these transactions was such as to show a uniform and persistent course of fraudulent manipulation of the affairs of this company such as really redounded solely to the interest of Wm. S. Noyes—aside from the incidental benefit that some of his board of directors secured through increases in their salaries, and the benefit which resulted to his brother in securing certain of the Osborn and Willis stock, and was in its entirety inequitable and could not be permitted to prevail; that the defendant must be called upon to account for it;

That Wm. S. Noyes must also account for the various transactions outside of that main feature of his wrong. That they were not sufficiently explained to remove the *onus* from one in control of the affairs of this company and occupying, as the court held,

a fiduciary relation to it. That Noyes had not sufficiently explained his securing of benefits from other sources; that he must account for all benefits received from the Bowers freighting and Gleim store transactions; that the tramway transaction had a peculiarly shady appearance; that all these transactions should be thoroughly searched out, because the rule is fundamental that one occupying the trust relation, which the court held the evidence fully established that Noyes did to the company, did not admit of this sort of dealing;

That because the court felt it was warranted by the law, it had decided to take the administration of the corporation out of the hands of Wm. S. Noyes, for that it was absolutely in his control, although ostensibly in the hands of a board of directors, the court was left with no doubt; that the court proposed to appoint a receiver to see if the interests of these stockholders could not be subserved by a different administration of the property, which the evidence demonstrated to be of great value; at least, at the time the control was secured by Noyes, because the income had been dissipated in one way or another so as never to reach the stockholders;

That the increases in salaries under the circumstances were not honest; that unless explained, they must be accounted for; that the bonus resolution was as bald a fraud as had ever fallen under the court's observation; that it was without any character of fundamental right in its inception; that the court would like to see the affairs managed

with such intelligence, forethought and frugality as would bring something for the stockholders;

That a decree was ordered drawn requiring Wm. S. Noyes and the other defendants as well to account for ill-gotten gains and as the result of fraud.

Both injunctions were continued by the interlocutory decree, a receiver appointed, and from which interlocutory decree and order appointing receiver the present appeals have been taken.

Argument.

I.

FINALITY OF INTERLOCUTORY DECREE AND ORDER APPOINTING RECEIVER AS AFFECTING RIGHT OF APPEALS, AND PROPRIETY OF DISPOSING OF THE CASE ON ITS MERITS.

In approaching this appeal, and before proceeding with our argument we are met with the question relative to the limits of investigation by this court concerning the finality of the interlocutory decrees.

Section 129 of the Judicial Code, U. S. Compiled Statutes 1916, Sec. 1121, provides for appeals from certain interlocutory decrees and orders.

Northern Pacific R. Co. v. Pac. Coast Lbr. Mfgrs. Assn., 165 Fed. 1, 5;

Union Pacific R. Co. v. Oregon & W. Lbr. Mfgrs. Assn., 165 Fed. 13;

Taylor v. Breeze, 163 Fed. 679-686;

American Grain Separator Co. v. Twin City Separator Co., 202 Fed. 205-206.

The important and perplexing question presenting itself to the appellees is, whether or not this court should decide the case on its merits on these combined appeals, or simply confine itself to the question of whether or not the interlocutory decree was improvidently granted, or whether or not in the order appointing the receiver the trial court exceeded his judicial discretion.

The word "hearing" as used in said section of the judicial code is an equity term and properly applied to the argument and consideration of a case in the several stages of its orderly progress, but when applied to that upon which the case is absolutely determined—disposed of—it is qualified by the word "final".

> U. S. v. Terminal Assn. of St. Louis, 197 Fed. 448.

"Hearing in equity" is trial of case, introduction of evidence, argument of counsel, and decree of court.

> Amer. Grain Separator Co. v. Twin City Separator Co., 202 Fed. 205;
>
> Pressed Steel Car. Co. v. Chicago etc. R. R. Co., 192 Fed. 517;
>
> Root v. Mills, 168 Fed. 688.

Judge Boyd, in Taylor v. Breeze, 163 Fed. 684, defines "interlocutory" in law, as meaning not that which decides the cause, but that which settles some intervening matter relating to the cause. A judgment or decree is final if it terminates the litigation on the merits so that in case of affirmance the

court below will have nothing to do but to execute the judgment or decree it originally rendered.

> Baxter v. Bellville Philips & Co. et al., 219 Fed. 309, 311;
>
> Gladys Belle Oil Co. et al. v. Mackey et al., 216 Fed. 130.

Although a decree called interlocutory held final in its nature.

> McDermott v. Hays, 197 Fed. 135;
>
> Robinson et al. v. Belt et al., 56 Fed. 329.

In Bostwick v. Brinkerhoff, 106 U. S. 4, it is held that it has not always been easy to decide when decrees in equity are final—and there may be some apparent conflict in cases on that subject. But in common law courts the question never has been a difficult one. In law, if a case is not settled on its merits before judgment, it is not a final judgment which is appealable.

After decree is made which disposes of the principal subject of litigation and settles rights of parties, other orders may be made in which material rights of the parties may be passed upon and which, when they partake of the nature of final decisions of those rights, may be appealed from.

> Farmers Loan & Trust Co., 120 U. S. 213;
>
> O'Dell v. H. Batterman Co., 223 Fed. 295.

In the last above cited case (p. 295), the rule distinguishing between interlocutory and final decrees for purposes of appeal is thus stated:

> "A decree is final when the decree disposes of the entire controversy between the parties.

> An adjudication is a final appealable order if it involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief except by recourse to an appeal."

Reference to Master:

Where decree determines rights of the parties and refers the cause to a Master for a purpose not affecting the decree, it is final and appealable.

Marian Coal Co. v. Peale, 204 Fed. 161, 164; 172 Fed. 639;
McGourkey v. Toledo etc. Co., 146 U. S. 544-550;
Winthrop Iron Co. v. Meeker, 109 U. S. 180;
Forgay v. Conrad, 6 Howard 204;
City of Des Moines v. Des Moines Water Co., 230 Fed. 573;
Chase v. Driver, 92 Fed. 780.

When, however, the Master's functions are judicial and not ministerial only, held not appealable.

Moran v. Hagerman, 64 Fed. 503;
Bebe v. Russell, 19 How. 284-287;
Cal. Nat'l. Bank v. Stateler, 171 U. S. 449.

The appellate court has a right to enter decree on the merits, particularly involving injunctions where the whole merits of a case are involved and a decree will end the litigation.

Knoxville v. Africa, 77 Fed. 501-505;
Smith v. Vulcan Iron Works, 165 U. S. 525;
Marden v. Campbell Printing Press etc. Co., 67 Fed. 809.

These decisions, however, were given in patent cases, and decisions rendered in favor of defendants in the trial court.

There are exceptional cases referred to in the decisions which would seem to sanction a decision on the merits in the instant suit.

Forgay v. Conrad, 6 How. 204;
Thomson v. Dean, 7 Wall. 342-346;
Withrop Iron Co. v. Meeker, 109 U. S. 180.

A review of the decisions is found in Ward Baking Co. v. Weber Bros., 230 Fed. 151, 155. We also refer to Cutting v. Woodward, 234 Fed. 308.

In the instant suit the interlocutory decree settles the rights of the several parties. It finds a general fraud on the part of appellants; it decides that Wm. S. Noyes is not entitled to Section 5, and directs that within thirty days after the entry of final decree he convey the property to Presidio Mining Company; he is to receive credit for the moneys paid on Section 5 account; it further decrees that Wm. S. Noyes shall account for profits made growing out of his relation as confidential agent of the company. It further decrees that defendant Osborn shall repay the money stolen from the corporation; that all the defendants shall account for salaries and moneys obtained from the company, and that the Standing Master in Chancery conduct this accounting and render his findings. The said Master's duties, although in a sense judicial, are mainly ministerial in this case.

Appellees urge a disposition of the case on its merits, so far as compatible with circumstances. We object, however, to the statements in appellants' brief (pp. 66-70) that the grounds for a decision on the merits, among others, are the alleged defective pleadings, claimed lack of evidence to support the decree, insinuated evil on the part of appellees, and purported innocence of appellants. The pleadings and evidence show the reverse of what is so insistently urged in said brief.

II.

FOUNDATIONAL REQUISITES AS AFFECTING JURISDICTION AND PLEADINGS APPLICABLE TO THIS SUIT; THE INTERLOCUTORY DECREE.

While no attack is made on the suit on jurisdictional grounds, we nevertheless deem it advisable to insert in our brief the law applicable.

Wm. S. Noyes answered separately in the case. The Presidio Mining Company and the remaining defendants united in the same answer, represented by the same counsel, and joined in the prayer asking for a dismissal of the bill. The alignment of the parties shows foreign residents as complainants and California residents as defendants.

The law applicable has recently been passed upon during this term by this court in the decision of Cutting v. Woodward.

We take up these matters in the following order:

(a) Jurisdiction of the court and arrangement of parties.

Citing our authorities on:

1. Arrangement of parties;
2. Amount involved;
3. Diversity of citizenship;
4. Indispensable parties;
5. Stockholder's suit;
6. That such a suit must be considered a suit on behalf of the corporation.

(b) The rules applicable to the pleadings.

1. Equity Rules;
2. General requisites of a bill in equity;
3. Joinder of causes of action, multifariousness;
4. Demand on stockholders, officers and directors;
5. Pleading fraud;
6. Laches;
7. Amended or supplemental bills.

(c) The Interlocutory Decree.

(a) Jurisdiction.

Arrangement of Parties; Amount Involved; Stockholder's Suit.

Jurisdiction, as we understand it, is the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials:

1. The court must have cognizance of the class of cases to which the one to be adjudged belongs;

2. The proper parties must be present;

3. The points to be decided must be in substance and effect within the issue.

Munday v. Vail, 34 N. J. Law 422;

In re Casey, 195 Fed. 328.

On subject of jurisdiction generally see Vol. 1, Chap. 2, Title 12, Sec. 991, U. S. Compiled Statutes Annotated 1916. Sec. 24 Jud. Code.

Under the Judicial Code two elements requisite,

1. Diversity of citizenship;

2. Amount in controversy over $3000 exclusive of interest and costs.

It is the duty of the court in determining requisite diversity of citizenship to arrange the parties with respect to the actual controversy, looking beyond the formal arrangement made by the bill.

> Helm v. Zarecor, 222 U. S. 36;
> Dawson v. Columbia Trust Co., 197 U. S. 180;
> Removal cases, 100 U. S. 457, 469;
> Federal M. & S. Co. v. Bunker Hill M. & M. Co., 187 Fed. 475, 477;
> Larabee v. Dolley, 175 Fed. 365—aff. 219 U. S. 121 on amount;
> Stephens v. Smart, 172 Fed. 466, 471, 473;
> Stewart v. Mitchell, 172 Fed. 905, 909.

In cases analogous to the instant suit for purposes of determining jurisdiction, the value of the right of the corporation sought to be protected governs and not the value of the complainants' interest therein.

> Larabee v. Dolley, 175 Fed. 365, 378;
> Carpentar v. Knollweed Cemetery, 198 Fed. 298.

Pecuniary value is fixed by (1) money judgment, (2) increased or diminished value of property affected by decision.

Way v. Clay, 140 Fed. 353;

Hartford Fire Ins. Co. v. Bonner Mercantile Co., 56 Fed. 383.

Amount alleged by complainants in good faith determines the amount in controversy.

Interstate Bldg. & Loan Assn. v. Edgefield Hotel Co., 109 Fed. 692;

Kunkel v. Brown, 99 Fed. 594;

Robinson v. Suburban Brick Co., 127 Fed. 804, 806.

In a suit by stockholder for appointment of receiver, amount in controversy held to be entire corporate assets.

Towle v. American Bldg. Loan & Inv. Co. 60 Fed. 131, 134;

2 C. J. Sec. 1330, col. 2, amount in dispute, and cases cited.

From foregoing authorities it is clear that the trial court had jurisdiction in this suit so far as the amount in controversy is concerned. Complainants' pleadings evidence clearly the requisite jurisdictional amounts.

Diversity of Citizenship.

Complainant W. S. Overton is a citizen and resident of Maryland. Complainant Carl A. Martin is a citizen and resident of Kansas (1, 2). They bring this suit for themselves and any other stockholders

who desire to unite, against the individual defendants as stockholders, officers and directors, and the corporation defendant in their control. All defendants are citizens and residents of California. The individual defendants refuse to permit the corporation under their control to sue, and admit a demand on them is useless. There is requisite diversity of citizenship to give the trial court jurisdiction on this ground under the facts, and said court obtained rightful jurisdiction.

Dodge v. Woolsey, 18 Howard 341;
Davenport v. Dows, 18 Wall. 626;
Hawes v. Oakland, 104 U. S. 450, 456, 460;
Doctor v. Harrington, 196 U. S. 579, 588;
Venner v. Great Northern Ry. 209 U. S. 24-33;
Hammer v. New York Railways Co., 244 U. S. 266, 274;
Kelly v. Mississippi River Coaling Co., 175 Fed. 482, 490.

The attitude of the Presidio Mining Company was and is hostile to appellees. It appeared in joint answers with the individual appellants, and by the same counsel, denied the allegations of the bill and prayed for the dismissal thereof.

See Cutting v. Woodward, recently decided by this court.

Indispensable Parties.

The Presidio Mining Company is an indispensable party to this suit, for a judgment cannot bind it

unless joined. Said corporation being in control of the individual defendants named in the suit, and they being antagonistic to complainants, it must be made a party defendant so that proper decree may be entered binding, benefiting or precluding it, according to the equities found.

See cases above cited; also

Black v. Foreman Bros. Banking Co., 218 Fed. 266;

Gaylor v. Cooper, 165 Fed. 757, 764;

Kuchler v. Green, 163 Fed. 91, 98;

Rogers v. Penobscot Min. Co., 154 Fed. 610, 614, 616;

Willoughby v. Chicago etc. Co., 25 Atl. 281.

Stockholder's Suit.

Any stockholder of the aggrieved corporation may bring suit where the corporation is controlled by antagonistic parties whom it is proposed to sue.

Dodge v. Woolsey, 18 How. 341;

Seminole etc. Co. v. Southern Life Ins. Co., 182 Fed. 96;

Meeker v. Winthrop Iron Co., 17 Fed. 48;

Grier et al. v. Union National Life Ins. Co., 217 Fed. 294;

Trustees v. Greenough, 105 U. S. 527;

Grant v. Lookout Mountain Co. et al., 27 L. R. A. 98;

4th Ed. Pomeroy's Eq., Vol. 3, Sec. 1095.

A stockholder's suit must be regarded as one brought on behalf of corporation.

Davenport v. Dows, 18 Wall. 627;
Porter v. Sabin, 149 U. S. 478;
Hill v. Glasgow R. R., 41 Fed. 614;
Byers v. Rollins, 13 Colo. 27; 21 Pac. 896.

An action brought by a stockholder to enforce a corporate right must be regarded as a suit brought on behalf of the corporation, and the shareholder can enforce only such claims as the corporation could enforce. The essential character of the cause of action remains the same whether the suit be brought by the corporation or by the stockholder.

Chetwood v. Cal. Nat'l. Bank, 113 Cal. 425.

(b) Pleadings.

Equity Rules.

Rule 18. Technical forms abrogated.

Rule 25. Bill of complaint; contents.

This section is not mandatory, but defines what is sufficient.

Pittsburgh Water Heater Co. v. Beler Water Heater Co., 222 Fed. 950.

Rule 26. Joinder of causes of action; whether justified in bill may be considered on appeal.

Miller Rubber Co. v. Behrend, 242 Fed. 515, 517.

Rule 27. Stockholder's bill.

Rule 38. Representatives of class.

Rule 39. Absence of persons who would be proper parties, etc.

Rule 37. Persons united in interest must be joined as plaintiffs or defendants. Where any one refuses to join he may be made a defendant.

Rules 19 and 34 refer to amendments and supplemental pleadings.

Each and every one of these rules has been fully complied with in the pleadings in this suit.

General Requisites of Bill in Equity.

Bill must contain facts sufficient to maintain complainant's cause. Must set out material facts constituting cause of action so defendant will know what to meet.

> Livingston v. Story, 9 Pet. 632;
> St. Louis v. Knapp Co., 104 U. S. 658;
> St. Louis v. Johnston, 133 U. S. 566;
> Lockhart v. Leeds, 195 U. S. 427.

Complainant must show title or interest in relief sought in order to move in the matter.

> U. S. v. San Jacinto Tin Co., 125 U. S. 273;
> Williams v. Haywood, 98 U. S. 72.

Defendants' liability or interest in subject matter.

> McClanahan v. Davis, 8 How. 170;
> Ringo v. Binns, 10 Pet. 269.

Must be sufficient equity apparent on face of bill to warrant the court in granting relief prayed.

> Harding v. Handy, 11 Wheat. 103;
> Hardin v. Boyd, 113 U. S. 756.

In most cases general certainty only is required in equity pleadings.

> St. Louis v. Knapp Co., 104 U. S. 658;
> Cherokee Nation v. Hitchcock, 187 U. S. 294.

Citizenship of the complainants is fully set out, paragraphs I, II, III, amended bill (40-41). Citizenship of defendants likewise fully set out in the amended bill paragraphs II and III (41).

As to Joinder of Causes of Action and Parties; Multifariousness.

A bill is multifarious which seeks to enforce against different individuals demands which are wholly disconnected. It may be safely asserted that no bill is multifarious which presents a common point of litigation, the decision of which will affect the whole subject matter and will settle the rights of all the parties to the suit.

> Brown v. Guarantee Trust Co., 128 U. S. 410, 412;
> Hayden v. Thompson, 71 Fed. 60, 67, 68;
> Kelly v. Boettcher, 85 Fed. 55, 64;
> Curran v. Campion, 85 Fed. 67, 70;
> Union Mill & Min. Co. v. Daughberg, 81 Fed. 86;
> Barcus v. Gates, 89 Fed. 791;
> Jones v. Missouri-Edison Electric Co., 144 Fed. 765, 777, 780;
> Rogers v. Penobscot Min. Co., 154 Fed. 613, 614;
> Howard v. Natl. Tel. Co., 182 Fed. 220, 221;
> Jessen v. Noyes, 245 Fed. 46, 48;
> Wilson v. Castro, 31 Cal. 426-431;
> Whitehead v. Sweet, 126 Cal. 75.

Each case must be decided upon its own facts on question of multifariousness.

> Brown v. Guarantee Trust Co., 128 U. S. 410, 412.

The rule with regard to multifariousness, whether arising from the misjoinder of causes of action or of defendants therein, is not an inflexible rule of practice or procedure, but is a rule founded on general convenience, which rests upon a consideration of what will best promote the administration of justice without multiplying unnecessary litigation upon the one hand, or drawing suitors into needless and unnecessary expenses on the other.

Jessen v. Noyes, 245 Fed. 48.

It is the constant aim of courts of equity to do complete justice, and to settle the rights of all persons interested in the subject matter of the suit, in order that litigation might not be conducted by halves, and the same persons may not be harassed by a multiplicity of suits in reference to the same subject matter. No invariable rules. Citing

Story Eq. Pleadings;

Union Mill & Min. Co. v. Dangberg, 81 Fed. 86.

Where case made by the bill is so entire that it cannot be prosecuted in several suits, and yet each of the defendants is a necessary party to some part of the case as stated, neither of the defendants can demur for multifariousness or for misjoinder of causes of action in some of which he has no interest.

Randolph v. Daly, 16 N. J. Eq. 315.

After sifting the decisions, the rule for joinder of parties and causes of action seems to be based on:

(a) Convenience;

(b) To prevent multiplicity of suits affecting same subject matter;

(c) To adjudicate all rights of various parties in same action;

(d) To prevent needless expense of suitors;

(e) To do complete justice in one suit, and not by halves.

In the instant suit there is a charge of general fraud against all individual defendants, to the detriment of the company. The amended and supplemental bill, with the amended prayer, present a common point of litigation. Each defendant is a necessary party for a full and complete determination of the matters in dispute. Each is interested in some part of the subject matter of the suit. There is likewise a common interest of complainants in the subject matter of the suit and the recovery sought. Wm. S. Noyes is sought to be made a trustee for Section Five and moneys derived by him therefrom; the corporation is sought to be held the lawful owner of Section Five, and that it obtain title thereto by a proper conveyance from said Noyes; also to recover from Osborn the moneys he embezzled from the corporation. We allege he participated in the funds taken from the company treasury under the bonus resolution illegally adopted by his vote and the other defendants excepting Noyes, but under Noyes' control.

The stock taken by Noyes from Osborn in the transactions materially helped give Noyes control over the defendant corporation and the manipulations of its affairs. All transactions had their inception in the fall of 1912, and continued thereafter,

with the connivance, collusion and conspiracy of all defendants. Exorbitant salaries paid are sought to be recovered. No element of the case can be omitted, as each is a constituent part of the general fraud charged. The bills allege the grounds of fraud. No one element could be discarded. Each defendant must be dealt with according to his individual acts through the entire series of transactions. There can be no resolution of the whole controversy into a series of separate distinct and unconnected acts which might be the basis for separate suit. There must be a uniting of the transactions into a complete whole. The logic applicable to synthesis, and not of analysis, must be applied. For this purpose a complaint framed on the acts of the parties must of necessity include the transactions complained of as a whole. There is but one general demand, to protect the corporation from fraud and recover for it and its stockholders what equity and good conscience dictate. In this suit all persons on one side (for the corporation) have an interest in the object of the suit.

Wilson v. Castro, 31 Cal. 427.

William S. Noyes' acquisition of Section 5 was a part of the program of controlling the company and manipulating its affairs to obtain funds to repay the notes given for moneys with which he paid for Section 5. This was consented to by all the appellants in the case, for salaries, moneys and benefits derived, and they collusively conspired together with him in the support of his program. It is no mis-

joinder to unite William S. Noyes with the other defendants under the facts and circumstances.

Kelly v. Boettcher, 85 Fed. 64;
Union Mill & Min. Co. v. Dangberg, 81 Fed. 86, 87;
Field v. Western Life Indemnity Co., 166 Fed. 609, 610.

Demand on Stockholders, Officers and Directors.

Equity Rule 27;
Hawes v. Oakland, etc., 104 U. S. 460;
Doctor v. Harrington, 196 U. S. 588;
Forbes v. Wilson, 243 Fed. 267;
Heinz v. Natl. Bank of Commerce, 237 Fed. 945, 948;
Delaware & Hudson Co. v. Albany etc. Co., 213 U. S. 435, 442, 453;
Wathen v. Jackson Oil Co., 235 U. S. 639, 640;
Ross v. Quinnesec Iron Min. Co., 227 Fed. 341;
Hyams v. Calumet & Hecla Min. Co., 221 Fed. 538;
Miner v. Belle Isle Ice Co., 17 L. R. A. 417;
Willoughby v. Chicago etc. Co., 25 Atl. 281, col. 2;
Wills v. Nehalem Coal Co., 96 Pac. 534, 535.

It is admitted by appellants in their answer (Par. XXI, 137, 202) that demand on them to institute suit was useless. This brings the pleadings within the rule that it is not necessary to

plead the preliminary steps mentioned in Rule 27 when the interests of the directors are shown by the pleadings to be antagonistic to those of the corporation.

Ogden v. Gilt Edge Mines Co., 225 Fed. 723.

Pleading Fraud Generally, and Constructive Fraud.

Complaint should state facts and circumstances which constitute the fraud.

Moore v. Green, 19 How. 69, 72;

Bailey v. Glover, 21 Wall. 348;

U. S. v. Exploration Co., 203 Fed. 388-340;

Miller v. Ash, 156 Cal. 566;

Notes to Huston v. Williams, 25 Am. Dec. 96;

> "In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by the affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief, provided suit is brought within the proper time after the discovery of the fraud. In equity suits it is also held that where a party is defrauded and fraud is concealed, or of such a character as to conceal itself, whereby the injured party remains in ignorance of it without fault or want of diligence on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the person committing the fraud to conceal it from the other party."

Dorsey Machine Co. v. McCaffrey, 38 N. E. 211.

Laches.

> "Laches has been defined to be such neglect or omission to assert a right as. taken in conjunction with lapse of time more or less great, and under circumstances causing prejudice to an adverse party, operates as a bar in a court of equity."

Venner v. Chicago City Ry. Co., 86 N. E. 273.

Each case of laches depends upon its own circumstances.

Hanchett v. Blair, 100 Fed. 827.

It depends on whether, under all the circumstances the plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did.

Marks v. Merrill Paper Co., 203 Fed. 19.

> "Laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

Penn Mutual Life Ins. Co. v. Austin, 168 U. S. 699.

When actual fraud is proven, the court will look with much indulgence upon the circumstances tending to excuse the plaintiff from a prompt assertion of his rights.

Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 39.

In cases of actual fraud a delay, even greater than that permitted by the statute of limitations, is not fatal to the plaintiff's claim.

McIntire v. Pryor, 173 U. S. 54.

Courts of equity have no more valuable function than to protect minority stockholders from the frauds of the majority.

Backus v. Brooks, 195 Fed. 454.

On fraud in acquisition of property, and laches.

Barstow v. Beckett, 122 Fed. 146.

Laches may be excused from ignorance of one's right, or from obscurity of the transaction. What is required is that one seeking the aid of equity should use reasonable diligence in his application for relief.

Godkin v. Cohn, 80 Fed. 465.

In cases of fraud, however, it usually takes something besides mere delay to make a chancellor close the door; for instance, a change of conditions, brought about by the complainants' apparent acquiescence in the wrong, which would make a present enforcement of the claim inequitable.

Citizens Savs. & Trust Co. v. Illinois Central R. Co., 182 Fed. 612.

On laches generally, see

Michoud et al. v. Girod et al., 4 How. 560;
Prevost v. Gratz, 6 Wheat. 481;
Bailey v. Glover, 21 Wall. 342;
Rosenthal v. Walker, 111 U. S. 185;
McIntire v. Pryor, 173 U. S. 38, 54;
Saxlehner v. Eisner Co., 179 U. S. 19, 39;
Townsend v. Venderwerker, 160 U. S. 171;
Galliher v. Cadwell, 145 U. S. 368, 371, 373;
Badger v. Badger, 69 U. S. 92, 94;

Humphreys v. Walsh, 248 Fed. 214;
Pickens v. Merriam, 242 Fed. 363;
Elder v. Western Min. Co., 237 Fed. 966, 974-976;
Marks v. Merrill Paper Co., 203 Fed. 19;
Central R. Co. of New Jersey v. Jersey City, 199 Fed. 257;
Venner v. Chicago City Ry. Co., 236 Ill. 349; 86 N. E. 273;
Wills v. Nehalem Coal Co., 52 Ore. 70; 96 Pac. 528;
Miller v. Ash, 156 Cal. 544, 563, 566;
Cahill v. Superior Court, 145 Cal. 42;
Chapman v. Bank of California, 97 Cal. 155.

On distinction between limitation and laches, see
Galliher v. Cadwell, 145 U. S. 371, 373;
Penn Mutual Life Ins. Co. v. Austin, 168 U. S. 699;
Smith v. Smith, 224 Fed. 6;
Wills v. Nehalem Coal Co., 96 Pac. 535.

The general rule is that, where there has been apparent laches in the prosecution of a suit in equity, it is incumbent upon the plaintiff, in order to repel the presumption of laches or unreasonable delay, to set up in his bill the reasons why the suit was not brought at an earlier period, stating specifically what were the impediments to an earlier prosecution of the suit.

When suit is brought within the time fixed by statute of limitations, burden is on defendant to show existence of laches. If brought after statu-

tory period, plaintiff must plead and prove laches do not exist.

Wills v. Nehalem Coal Co., 96 Pac. 535.

The pleadings show that in March, 1915, appellees first learned of and became suspicious of transactions occurring subsequent to December, 1912, in the company's affairs. Investigation was immediately begun, and suit commenced in July, 1915.

The foregoing authorities abundantly sustain appellees' position. The purported defense of laches is not well taken.

Amended or Supplemental Bills.

Equity Rule 19, 20. An amended bill is deemed to be a part of the original bill and a continuance of the suit.

French v. Hay, 22 Wall. 231, 238.

Equity Rule 38. Supplemental bill is properly for matters occurring after filing the bill, and is designed to supply some defect in the structure of the original bill. Must be in support of relief originally prayed for.

Kennedy v. Bank, 8 How. 586;
Bank v. Ritchie, 8 Pet. 128;
Whiting v. Bank, 13 Pet. 6;
Jenkins v. Int. Bank, 127 U. S. 484;
Root v. Woolworth, 150 U. S. 401.

Is a mere adjunct to original bill.

Shaw v. Bill, 95 U. S. 10.

Rule as to amendments applies to supplemental bill.

Sawyer v. Piper, 189 U. S. 154;
Vicksburg v. Vicksburg Water Co., 202 U. S. 453;
Oregon & Transcontinental Co. v. Northern Pac. R. Co., 32 Fed. 428;
Sheffield & B. Coal, Iron & Ry. Co. v. Newman, 77 Fed. 787;
Liebing v. Matthews, 216 Fed. 11, 12.

Equity may grant relief as to matters occurring subsequent to filing bill, without supplemental complaint, if within scope of original bill.

City of Denver v. Mercantile Trust Co., 201 Fed. 810.

Admissions in answer may cure defects in complaint, especially if facts are substantially set forth in the same.

Knox v. Smith, 4 How. 298;
Jackson v. Ashton, 11 Pet. 229;
Greenleaf v. Birth, 5 Pet. 132;
Cavender v. Cavender, 114 U. S. 464;
Provisional Municipality v. Lehman, 57 Fed. 330;
Richardson v. Green, 61 Fed. 431.

The affirmative defenses pleaded set up many of the salient facts in this suit, but denuded of their sinister aspects. The facts, however, being admitted and decree rendered thereon, precludes a reversal on grounds of alleged defective pleading.

We likewise submit the evidence requires an affirmance of the decree of the trial court.

(c) Decree.

Form of decree. Equity Rule 71.

Conveyance; time within which to be performed. Equity Rule 8.

Findings; not necessary as in law cases, but facts sufficient within the issues made by pleadings and sustained by evidence should be found.

Liebing v. Matthews, 216 Fed. 1-12.

See also

Peirsoll v. Elliott, 6 Pet. 95.

Decree conclusive on all issues joined.

Russell & Co. v. Lamb, 49 Fed. 771;
Kelham v. Wilson, 112 Fed. 573;
Wilson v. Smith, 117 Fed. 711;
Aetna L. Ins. Co. v. Hamilton County, 117 Fed. 84;
Russell v. Russell, 129 Fed. 438;
Thompson v. Roberts, 24 How. 240.

Decrees outside the issues invalid.

Mitchell v. Hitchman Coal & Coke Co., 214 Fed. 713;
Reynolds v. Stockton, 140 U. S. 266;
Munday v. Vail, 34 N. J. Law 418, 422;
In re Casey, 195 Fed. 322, 328.

Court not to consider anything not in bill and exhibits.

Chicago Great Western R. Co. v. Le Valley, 233 Fed. 385;
Ward v. Webber, 230 Fed. 142, 156;

Pacific R. R. of Mo. v. Missouri Pacific Ry., 111 U. S. 519;

Richardson v. Lovee, 94 Fed. 379.

Decree must be responsive to issues.

Compton v. Jessup, 68 Fed. 295.

Decree in equity adapts itself to the necessities of the case. Distinctions between law and equity.

Payne v. Hook, 7 Wall. 432.

Its great advantage over the judgment at law is its elasticity, but it should not go beyond the relief necessary to secure complainant in what he is entitled to under the pleadings and prayer.

Underground Electric Ry. v. Owsley, 169 Fed. 671;

Hill v. Phelps, 101 Fed. 650;

Gage v. Smyth Merc. Co., 160 Fed. 426;

Lockhart v. Leeds, 195 U. S. 427-437;

Graham v. La Crosse & M. R. Co., 3 Wall. 710-712.

Decree presumed to be right.

Manhattan L. Ins. Co. v. Wright, 126 Fed. 88;

Big Six Dev. Co. v. Mitchell, 138 Fed. 285;

North American Exploration Co. v. Adams, 104 Fed. 407.

III.

ASSIGNMENTS OF ERRORS.

The assignments of error in each appeal are practically the same. They advert in substance to:

1. Pleadings.

2. Insufficiency of evidence, error of law.

3. Wrongful injunction and appointment of receiver.

Assignments numbered 30 to 62, (1125-1134) and 29 to 61, (1163-1171), respectively, pertain to general findings of fraud by the court in the interlocutory decree, to the detailed findings of decree relative to resolutions, contracts pertaining to Section 5, salaries, and also the findings relative to extra profits made by Wm. S. Noyes, the peculations of Osborn, and the directions to account before the Master; also that the court erred in decreeing that the company assets and property were dissipated; that the court should have found for the defendants and against the complainants.

Assignments 62 to 71 (1171-1175) refer to the order appointing receiver generally and specifically objecting thereto.

No good purpose would be subserved by taking up each assignment of error alleged separately as set forth in the transcript. To avoid prolixity and unnecessary argument, we have confined ourselves to the salient features of the case, the pleadings, the evidence, and the decree.

Assignments No. 2, page 1099, to 29, page 1125, and Assignments No. 2, page 1136, to No. 29, page 1163, Vol. IV of the Transcript, inclusive, having been improperly urged in the original assignments of errors, were withdrawn and are not to be considered on this appeal. See stipulation (1207).

Laches are asserted by appellants, but there is no assignment asserting laches, either in the transcript of record or in counsel's brief. Rule 11 requires that the assignment of errors shall form a part of the transcript of the record and be printed with it. Neither is there is a compliance with Rule 24 requiring a specification of the errors relied upon. Laches not being asserted in any assignment of error nor urged in the specifications in appellants' brief, we submit they are not entitled to be heard on this subject at all.

IV.

EXCEPTION I.

Vol. IV, pp. 1097, 1135, Brief 37, 50.

It is urged, although not seriously, by appellants that the court erred in refusing to dismiss the bill of complaint in so far as it seeks to hold Wm. S. Noyes as a trustee for Section 5, because the bill does not state a cause of action against him in seeking to charge him as a trustee, because:

(First) It is not averred that the Presidio Mining Company had any right, title or interest in Section 5 when purchased by William S. Noyes;

(Second) That it is not averred that Noyes was clothed with any fiduciary relation in regard to Section 5 at the time of purchase;

(Third) That it does not appear that he was under any duty to buy Section 5 for the company;

(Fourth) It is urged that the supplemental complaint, page 2, avers Noyes borrowed the money to buy said section.

A fair reading of the amended and supplemental complaints shows that the acquisition of Section 5 was a part of the general conspiracy to control and manipulate both Section 8, the company property, and Section 5 for W. S. Noyes' benefit and those associated with him. The transactions commenced in December, 1912, and on May 26, 1913, title to Section 5 was transferred to Wm. S. Noyes, during which intervening period he secured the control of the Presidio Mining Company.

He commenced in December, 1912, to carry out his plans. On discovery that Section 5 could be secured he went at once to Oregon and arranged with Benton Bowers, the company's chief contractor, for $10,000.00 for the purpose of acquiring Section 5. Then he took part of Osborn's stock, 28,607 shares, which was used as collateral in the Marfa National Bank for a further loan of $10,000.00. He arranged for these loans before examining the property and before closing any of the options for the stock. He then examined the property and satisfied himself it was worth the money before paying the purchase price.

The expenses incident to examination of the property and sampling were paid by the Presidio Mining Company, and the examinations made and the sampling done by the Presidio Mining Company employees. Moneys expended in the premises were paid by the company.

Gleim testified:

> "It was my opinion that we ought to get the property, if possible some way. By 'we' I

mean Mr. Noyes and myself, as representatives of the Presidio Mining Company'' (565).

The company's credit was back of Noyes in handling the situation.

He alone knew the conditions and value of the property, which he had learned because of his confidential position with the corporation for so many years. He was the confidential and trusted agent of the company, in sole charge of all its affairs in Texas. Osborn, on account of his peculations, was subject to his domination, and Mrs. Willis, the other large stockholder holding the control with Osborn, was entirely dependent upon Noyes for information, relied on his judgment, and was a victim to his artful, importunate and cunning machinations.

The company's bank account was transferred to the Marfa National Bank coincident with its loan to Noyes (1071). The repayments of money borrowed by Noyes to pay for Section 5 were assured by the entire corporate assets through the bonus resolution of February 15, 1913, in the sum of $45,000, arranged by Noyes. The company's assets were utilized to actually pay for the property.

He could not have either acquired Section 5 nor worked it without the credit, support, plant and equipment of the Presidio Mining Company. Said corporation opened up the property, installed the machinery and equipment to operate, and carried on all this without the enlistment of any capital by Noyes. All overhead expenses were apportioned

to Section 8, the company property, and not to Section 5.

The results show that Noyes took wrongful advantage of his confidential relation with the company constituting that of a fiduciary, and personally profited to the detriment of the corporation. In practical effect the company funds were used to pay for the property, although ostensibly Noyes paid for the same (see oral opinion, (417) Appendix 3). Company notes could and should have been given instead of notes of Wm. S. Noyes in buying Section 5, for the company paid the money to Noyes with which he adjusted his notes in the premises. He compelled the course of activity, followed and forced matters through along the lines he wanted because he controlled the situation and used the corporation for his personal benefit. The court so found (Appendix 4). The allegations of the amended and supplemental bills under the foregoing facts are sufficient, and fully meet every objection specified under subdivisions 1, 2, 3 and 4 of said assignments of errors numbered 1 on both appeals. The complaints amended and supplemental particularly allege a complete story, and from the allegations is deduced and there was proven a charge of gross, actionable fraud, of which one specific element, namely, the purchase of Section 5, is but a part of the whole. The proof likewise sustains the allegations and the decree specifically finds against Noyes in the premises.

The court found against Noyes and all defendants on the original motions to dismiss the amended bill,

and again on the merits after a fair and impartial trial.

V.

ISSUES—BURDEN OF PROOF.

Issues.

In stating appellees' position concerning the issues in the case we are mindful of the distinctions between law and equity in the forming of an issue for purposes of presentation of the evidence and the conclusions to be deduced therefrom. We also touch upon the question of fraud and constructive trusts.

A case is at issue upon filing the answer.

Equity Rule 31.

As to answer, original or amended bills, Rules 30, 32.

An "issue" is a specific point in dispute between the parties presented by the pleadings.

Simonton v. Winter, 5 Pet. 141;
23 Cyc. 368.

A material issue is one taken on a material allegation which cannot be stricken from the pleadings without leaving it insufficient.

Antonio Tract Co. v. Higdon, 123 S. W. 732.

In equity it "is an issue upon a fact, which has some bearing upon the equity sought to be established."

Wooden v. Waffle, 6 How. Pr. (N. Y.) 145, 151, 152.

"An equity pleading frequently, if not generally, consists of an aggregation of facts and circumstances without logical dependency, but the accumulated weight of which is claimed to be sufficient to raise or defeat an equity.

If you abstract a fact you have not of necessity broken a chain, but only diminished the weight of the whole. If you have taken enough out of the scales, the equity claimed will kick the beam; but not otherwise.

It follows from this that the term 'material issue' cannot be applied to an equity pleading in the common law sense, as an issue decisive of the whole case. A material issue in such cases is an issue upon a fact which has some bearing upon the equity sought to be established."

Justice Selden in Wooden v. Waffle, 6 Howard Pr. Rep. p. 152.

Distinction is kept in United States courts between law and equity—no blending of the two allowed.

Scott v. Neely, 140 U. S. 111;
Scott v. Armstrong, 146 U. S. 512;
Langtry v. Wallace, 182 U. S. 550;
Green v. Mills, 69 Fed. 857.

Who Has the Affirmative.

He who asserts the affirmative must generally prove it.

Simonton v. Winter, 5 Pet. 148.

For discussion on burden of proof and presumptions, see

Liberty Bell Gold Min. Co. v. Smuggler Union Min. Co., 203 Fed. 803.

On presumptions in fraud cases similar to the instant suit before the court, see

U. S. v. Carter, 217 U. S. 300, 301.

Answer of one defendant not evidence against his co-defendant, but where one is affected through another it may be.

Field v. Holland, 6 Cranch. 8;
Leeds v. Marine Ins. Co., 2 Wheaton 380.

Answer of one defendant not evidence in behalf of another co-defendant.

Morris v. Nixon, 1 How. 118;
Putnam v. Day, 22 Wall. 60.

Matters set up in avoidance by defendant requires defendant to prove the matter in avoidance.

Clarke v. White, 12 Pet. 178;
McCoy v. Rhodes, 11 How. 131;
Uri v. Hirsch, 123 Fed. 569;
Lake Shore Ry. Co. v. Felton, 103 Fed. 231.

In setting forth the aggregation of facts going to make up the issue as a whole in the instant suit, complainants' position may be summed up to be as follows:

Issues.

1. That the directors and officers of the Presidio Mining Company, who are also its majority stockholders, are guilty of a breach of trust and fraud growing out of their relations with the company and its minority stockholders.

2. That said Board is under the absolute control and domination of Wm. S. Noyes,—that they are his nominees and biddable directors. That Wm. S. Noyes is the company.
3. That the defendants have all wrongfully personally profited to the detriment and injury of the minority stockholders.
4. That Wm. S. Noyes wrongfully acquired Section 5. That a constructive trust exists as to and is impressed on said section in favor of Presidio Mining Company.
5. That restitution should be made by each of said defendants according to his or her several liability.
6. That a receiver should be appointed subject to the order of this court.

Defendants' position may be defined as a general denial of all of the foregoing statements or assertions.

Our own position, comprehended in the foregoing, may be condensed into being an asserted:

1. Fraud.

2. Breach of fiduciary relations by all defendants.

3. Constructive trust impressed on Section 5.

And we submit our position is sustained by a fair review of the evidence and the law applicable.

Touching the acquisition of Section 5, an analysis of the evidence will show that it was but a single link in the chain of fraud; for

(1) The securing of options by Noyes in December, 1912, on the Silver Hill stock owning Section 5 was not an isolated transaction; because

(2) It had its inception in November, 1912, but said stock purchase culminated April 1, 1913, the legal title to Section 5 passing to Wm. S. Noyes May 26, 1913; during which time

(3) In December, 1912, the 28,607 shares of the Osborn stock were taken by Noyes and used as collateral at the Marfa National Bank to secure his $10,000 loan; an inducement to grant said loan was the changing of the company bank account from the San Antonio Bank to said Marfa Bank; and

(4) January 29, 1913, the 50-cent lease was authorized, and the change in the company directorate, begun by falsification of minutes that date, culminated January 31, 1913, when the defendants took office; followed February 15, 1913, by the $45,000 bonus resolution, of which "$11,000 forthwith" was used to conceal the Osborn shortage. This concealment was connived at, participated in, and completed by Osborn, B. S. Noyes, Peat and Miss Doherty (representing Mrs. Willis), in the presence of Wm. S. Noyes, who used said money the same month to obtain full control of the corporation by securing 25,000 additional shares of Osborn's stock, followed by the transfer of 5000 shares of the Willis stock and 3606⅓ shares of Osborn's stock to B. S. Noyes, and the further

transfer of the remainder of Osborn's stock to his brother and himself in March, 1913; without

(5) The expenditure of any money by Wm. S. Noyes, but by the giving of notes to interested parties, thereby securing the money to purchase the Silver Hill stock, the payment of said notes being fully protected under the terms of the bonus resolution, which provided for an unconditional payment to him of the said sum of $45,000, *from the company treasury, and not from any profits from Section 5;* also

(6) All expenses incurred were paid by Presidio Mining Company. William S. Noyes, its confidential agent, alone knew the conditions. He concealed the same from the directors Gardiner, Herger and Fish, and all stockholders other than those under Noyes' control. All of which

(7) Was a gross fraud, and operated to the benefit of Wm. S. Noyes and his nominees, the majority stock of this corporation, to the detriment and injury of the minority stockholders.

Fraud and Constructive Trust.

Fraud, as we apprehend and employ the term in this brief, is something more than a successful endeavor to alter rights by deception touching motives, or the employment of cunning or artifice used to deceive.

> "Fraud as a generic term, especially as the word is used in courts of equity, properly includes all acts, omissions, and concealments

> which involve all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another."
>
> 20 Cyc. 8.

Courts of equity do not set any precise boundary circumscribing the area of their jurisdiction. As Lord Chancellor Hardwicke in Lawley v. Hooper (3 Atkyns 278) says:

> "The court very wisely hath never laid down any general rule beyond which it will not go, lest other means of avoiding the equity of the court should be found out."

A classification of fraud frequently used by courts and text writers is:

(1) Actual or positive fraud;

(2) Legal fraud or fraud in law;

(3) Constructive fraud.

A constructive fraud has been said to be

> "an act which the law declares to be fraudulent, without inquiring into its motive; not because arbitrary rules on this subject have been laid down but because certain acts carry in themselves an irresistible evidence of fraud."
>
> 20 Cyc. 9.

Mr. Bispham uses the term presumptive fraud as applied to certain relations as follows:

> "Presumptive fraud is where the law supposes that a transaction is fraudulent from the mere circumstance of the relation of the parties or the nature of the transaction, without any

proof of actual deceit. Thus a bargain between a solicitor and client, a guardian and ward, a parent and child, a trustee and cestui que trust, *or any other two persons standing in a confidential or quasi-confidential relation,* touching the subject-matter as to which the fiduciary relation exists, will be set aside at the option of the client, ward, child or cestui que trust, as the case may be, unless the entire fairness of the transaction is abundantly proved."

Bispham's Principles of Equity (9th ed.) 1915, p. 33.

Complainants position is that there have been such confidential relations on the part of defendants with this corporation and its minority stockholders, and particularly that Wm. S. Noyes and the Presidio Mining Company at all times prior to 1912 and since have been in that confidential or quasi-confidential relation out of which the fiduciary relation emerges.

"Whenever two persons stand in such a relation that while it continues confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other and this confidence is abused, or the influence is exerted to obtain an advantake at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, *although the transaction could not have been impeached, if no such confidential relation had existed.*"

Bohm v. Bohm, 9 Colo. 108.

As quoted in Taylor v. Taylor et al., 49 U. S. 199, Justice Story says:

> "If confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interests, and cunning, and overreaching bargains. If the means of personal control are given, they must always be restrained to purposes of good faith and personal good. Courts of equity will not, therefore, arrest or set aside an act or contract, merely because a man of more honor would not have entered into it. There must be some relation between the parties which compels the one to make a full discovery to the other, or to abstain from all selfish projects. But when such a relation does exist, courts of equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance."

Our position is, that Wm. S. Noyes was the confidential and trusted employee, agent and superintendent of Presidio Mining Company, on whose shoulders rested the burden of conducting the company's affairs for a great many years prior to 1912. In said year Osborn and Mrs. Willis were the largest stockholders, who depended on him to operate the company's property. That conditions arose which placed the company, because of the large stockholders' dependence on Noyes. within said Noyes' power, and that he obtained a wrongful advantage to his own benefit, to the detriment of the minority stockholders.

> "A 'confidential relation' in law may be defined to be any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost

good faith for the benefit of the other party. Such a relation ordinarily arises where confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. A 'fiduciary relation' in law is ordinarily synonymous with a 'confidental relation'. It is also founded upon the trust or confidence reposed by one person in the integrity and fidelity of another, and likewise precludes the idea of profit or advantage resulting from the dealings of the parties and the person in whom the confidence is reposed." (Citing Civ. Code, sec. 2219 and cases.)

Bacon v. Soule, 19 Cal. App. 434.

The conditions in December, 1912, and January, 1913, were such that L. Osborn, through his thefts was brought under the control of Wm. S. Noyes; that his shortage was brought to the attention of Mrs. Willis in such a manner, and she was so suddenly called upon to act, that she did not obtain the advice of disinterested friends or counsel, but only the Noyes brothers. She was not aware of the consequences of her acts to the corporation. Miss Doherty, with no business experience, representing Mrs. Willis, blindly followed Wm. S. Noyes' dictation. Such conditions invoke the equitable doctrine as to concurrence of suspicious circumstances constituting constructive fraud announced in 10 R. C. L., 327:

"Circumstances or incidents, which, when existing in combination, are classed by courts of

> equity under the head of fraud, and so afford a ground for equitable interposition and relief. Important among these may be mentioned cases where surprise and sudden action are the chief ingredients, and where due deliberation is consequently wanting; where the victim is exposed to the cunning, the importunate, the artful, where proper time is not allowed to the party, and he acts improvidently, if those in whom he has confidence make use of strong persuasions, if he is not fully aware of the consequences but is suddenly drawn in to act, if he is not permitted to consult disinterested friends or counsel, and if there has geen great inequality in the bargain, courts of equity will assist on the ground of fraud or unconscionable advantage."

The Silver Hill Mill & Mining Company stock was optioned to Noyes in December, partially paid for in January, 1913, fully paid for by April 1, 1913, with borrowed money, at a time during which Wm. S. Noyes was also securing the control of the Presidio Mining Company by methods and under conditions which constitute fraud; under said facts remedial justice requires that the interlocutory decree entered in the case be upheld, for the authorities abundantly sustain the position that the fraud found vitiates the transactions complained of by complainants.

The Supreme Court of Texas, states the principle involved:

> "And it is unquestionably a common and familiar application of their 'remedial justice' for courts of equity to force upon the conscience of a party the duty of a trustee in regard to property which has been acquired by artifice or fraud, and where, either from the character of

the property or the circumstances under which it is acquired or held, it would be against equity to permit such party to hold it, except as a trustee."

Hendrix v. Nunn, 46 Texas 147.

"Fraud, indeed, vitiates transactions at law as well as in equity; but the jurisdiction of chancery is superior to that at common law, for two reasons—first, because in equity fraud has a more extensive signification than at law; and, secondly, because the relief afforded is much more complete."

Bispham's Prin. of Equity (9th ed.) 1915, p. 33.

Wm. S. Noyes was and is a trustee of Section 5, because of the fraud involved. There is a constructive trust arising out of the transactions, for

"In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein."

Pomeroy, 3rd Ed. vol. 3, p. 1053.

Mr. Perry observes:

"There is another large class of trusts which arise from frauds committed by one party upon another.

If a person obtains the legal title to property by such act or acts or circumstances of circumvention, imposition, or fraud, or if he obtains it by virtue of a confidential relation and influence under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interest of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust by construction out of such circumstances or relations, and this trust they will fasten upon the conscience of the offending party, and will convert him into a trustee of the legal title, and order him to hold it or to execute the trust in such manner as to protect the rights of the defrauded party and promote the safety and interests of society. Such trusts are called constructive trusts."

1 Perry on Trusts, 4th ed., sec. 166.

"Constructive trusts do not arise by agreement or from intention but by operation of law; and fraud, active or constructive, is their essential element. Actual fraud is not necessary, but such a trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by him who holds the legal title. Constructive trusts have been said to arise through the application of the doctrine of equitable estoppel, or under the broad doctrine that equity regards and treats as done what in good conscience ought to be done. Such trusts are also known as trusts ex maleficio or ex delicto, or involuntary trusts, and their forms and varieties are practically without limit, being raised by courts of equity whenever it becomes necessary to prevent a failure of justice."

39 Cyc. 169.

"Such trusts are creatures of equity, and take form whenever title is obtained by means of chicanery, deceit or other variety of fraud actual or constructive."

Sanguinetti v. Rossen, 12 Cal. App. 628.

Mr. Bispham, in speaking of constructive trusts, says:

* * * "Certain kinds of constructive trusts are based upon fraud; in other words, equity considers that, in consequence of certain fraudulent conduct, the relationship of trustee and cestui que trust is called into being, and the rights of the parties are determined upon the footing of that relation. The ground of relief, therefore, is both fraud and trust."

Bispham's Principles of Equity (9th ed.) 1915, p. 33.

Having stated our position in regard to fraud and constructive trusts so far as the law is concerned, we approach the question as to what the proof must be in this suit, and whether the proof must be measured by the rules obtaining as applied by courts of law or courts of equity. We are mindful of the observations made by Lord Hardwicke in 2 Ves. Ch. 155,

"that in equity fraud may be presumed from circumstances, but in law it must be proved. His meaning is, unquestionably, no more than this: that courts of equity will grant relief upon the ground of fraud established by a degree of presumptive evidence which courts of law would not deem sufficient proof for their purposes; that a higher degree, not a different kind, of proof may be required by courts of law to make out what they will act upon as fraud. Both tribunals accept presumptive or circumstantial

proof, if of sufficient force. Circumstances of mere suspicion, leading to no certain results, will not, in either, be held sufficient to establish fraud."

Bouvier, Vol. 2 (1914) p. 1306.

Mr. Perry says:

"Equity embraces fraud of all kinds. It affords relief in many instances in which no grounds for redress whatever exist at law."

Again:

"A great many transactions are presumed to be fraudulent in equity which are not so in law, where the rule is that fraud must be proved and cannot be presumed. In equity fraud may be *inferred* from attendant circumstances; it may be presumed from the subject matter of the contract, or from the relations of the parties; or it may afford ground for relief when it simply affects third persons not parties to the transactions."

1 Perry on Trusts, 4th ed., p. 342.

"As well in equity as at law, fraud is not absolutely presumed, but must be proved. Yet, while in either forum the proof may be circumstantial, in equity an inference of fraud sometimes conclusive may be drawn upon the proof of facts less potent or less direct than would be deemed sufficient at law for that purpose."

16 Cyc. 84.

"A deduction of fraud may be made, not only from deceptive assertions and false representations, but from facts, incidents and circumstances which may be trivial in themselves, but decisive evidence in the given case of a fraudulent design."

Vol. 2, 14th ed. Kent Comm. 484.

In Rea v. Missouri, 17 Wall. 543, Mr. Justice Bradley said:

> "To establish fraud, it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is not only sufficient, but in most cases it is the only proof that can be adduced."

> "Fraud is a question of fact, but it need not be shown by positive evidence, as this can seldom be done. It is generally proved by circumstantial evidence, and may be established by inference, like any other disputed fact."

Williamson et al. v. North Pacific Lumber Co., 70 Pac. 390.

> "The proofs in cases of fraud are usually circumstantial. Frauds are a species of the crimen falsi, which, like larceny, are not done openly. They are usually shown as inferences from facts established, rather than as facts expressly proven. We will look to the character of the transaction, not for the purpose of proving this imputed fraud, but for the purpose of ascertaining whether there was any proof worth weighing of its existence."

Butler v. Collins, 12 Cal. 464.

> "In questions of fraud a wide range of evidence is allowed. Fraud assumes many shapes, disguises, and subterfuges, and is generally so secretly hatched that it can only be detected by a consideration of facts and circumstances which are not unfrequently trivial, remote and disconnected. To interpret their meaning, or the full meaning of any one of them, it may be necessary to bring them together and contemplate them all in one view. In order to do this it is necessary to pick one up here and another there until the collection is complete. A wide

latitude of evidence is therefore allowed, in order that fraud may be detected and exposed."

Merchants Nat'l. Bank v. Greenhood, 41 Pac. 259.

Again the writer of said decision on said page 259 states:

"Fraud conceals itself. It does not move upon the surface in straight lines. It goes in devious ways. We may with difficulty know 'whence it cometh and whither it goeth'. It 'loves darkness rather than light, because its deeds are evil'. It is rarely that we can lay our hands upon it in its going. We are more likely to discover it at its destination, before we know that it has started upon its sinuous course. When we discover it, the search light of a judicial investigation goes back over its trail and lightens it from beginning to end."

In Henyan v. Trevino, 137 S. W. 481, we find stated:

"Equity has a searchlight that penetrates the innermost depths of the human soul and reads its most hidden intent as though its eye were divine. When it sees the intent was fraudulent, it, with a sigh for human frailty, brushes it aside and substitutes in its stead the intention of honesty and fair dealing, and with its strong, though gentle, hand compels its performance."

Burden of Proof.

Our position in this suit is, that the burden of proof rests upon the directors of Presidio Mining Company as the majority stock, dominated by Wm. S. Noyes, to show that all their acts and transactions were fair. The rule particularly applies to Wm. S.

Noyes, who, having contracted with himself while in an official position and in a fiduciary relation, must prove that the transactions were fair and open, and that no undue advantage was taken by him of the company nor of its minority stockholders.

In Miner v. Belle Isle Ice Co., 17 L. R. A. 417, the court in discussing the question of breach of duty of majority stockholders who control a corporation to the detriment of minority, in speaking of the burden of proof says:

> "The contracts fixing salaries and rentals must therefore be held not only voidable, but absolutely void. In any case the burden is upon the director to show fairness, reasonableness, and good faith, and upon this record these transactions must not only be held to be constructively fraudulent, but fraudulent in fact."

Again, in a case involving a question of alleged misapplication of corporate funds by the majority stockholders in securing a lease at an exorbitant rental, the court says:

> "When a trustee or the officer or director of a corporation deals with himself, as an individual, or in the character of trustee, director, or officer of another corporation, with respect to the funds, securities, or property of the corporation, the transaction is at least open to question by the corporation, or, in a proper case, by its stockholders; and the trustee is bound to explain the transaction, and show that the same was fair, and that no undue advantage has been taken by him of his position, for his own advantage, or the advantage of some other corporation in which he has an interest. * * *

> When it appears that the trustee or officer has violated the moral obligation to refrain from placing himself in relations which ordinarily produce a conflict between self-interest and integrity, there is, in equity, a presumption against the transaction, which he is required to explain."
>
> Sage v. Culver, 41 N. E. 514.

Again, in Ross v. Quinnesec Iron Min. Co., 227 Fed., p. 337, concerning a bill brought by a minority stockholder seeking to set aside a contract made by a corporation through its directors who were also beneficiaries under the contract, it was held, at page 343:

> "The important question thus is whether the action of the Quinnesec directors in June, 1912 (and this was followed by like action in 1913), contracting with Corrigan, McKinney & Co. for the sale of iron ore and pig iron on the commissions stated, was a fair and reasonable transaction; that is to say, whether the payment of the commissions in question is under existing conditions a fair and reasonable corporate expense. As Corrigan, McKinney & Co. practically controlled the action of the board, and thus in effect were on both sides of the contract, the directors representing this control occupied a fiduciary relation toward the minority stockholders; * * * and the burden is on them to show that the contract was a fair and reasonable one as respects the minority stockholders." And cases cited.

In the case of Meeker et al. v. Winthrop Iron Co., 17 Fed. Rep. 50, which was a suit by a minority stockholder to set aside a lease of the mine owned by the corporation, adopted by the votes of the

holders of majority stock of the corporation, and pursuant to which said lease the benefits accrued to the said officers individually, the court in discussing the question of burden of proof said:

> "The ownership of a majority of the capital stock of a corporation invests the holders thereof with many and valuable incidental rights. They may legally control the company's business, prescribe its general policy, make themselves its agents, and take reasonable compensation for their services. But, in thus assuming the control, they also take upon themselves the correlative duty of diligence and good faith. They cannot lawfully manipulate the company's business in their own interests, to the injury of other corporators. Any contract made by them in behalf of their principal with themselves, or with another, for their personal gain, would be voidable at the option of the company. We may therefore admit that the stockholders' meeting of October, 1881, was legally called and regularly convened (facts, however, denied by the complainants); that it possessed the power to dispace two of the existing directors and of electing three of defendants in their stead; to direct a lease of the company's mine, and dictate the company's general policy within the scope of its charter's privileges, and yet defendants would be without the legal right to appropriate the corporate property to themselves, or to make any other disposal of it for their private benefit. If they could, they would be, in effect, the beneficial owners of the entire corporate property. If they can make such a lease, they can, as selfishness or caprice shall dictate, modify its terms, expend the company's entire income in improvements to facilitate their individual interests, or do anything else their selfishness or cupidity may suggest. The

law does not thus vest majority stockholders with any such dangerous power, invite such peculations, or open the door to such abuses. If a majority of the stockholders can in any event and under any circumstances thus vote away the corporate property to their individual uses—a question that need not be decided in this case—they could only do so upon the clearest and most satisfactory evidence of good faith and for an adequate consideration; *and the burden of proof is upon the parties thus acting and claiming the enforcement of such a contract. All doubts in relation to adequacy of consideration and good faith ought to be resolved in favor of the principal.*"

VI.

DECISION AND INTERLOCUTORY DECREE.

As to the Conclusiveness of the Decision and Decree Entered.

Appellants' attack on the decision of the trial court is not premised on a failure to obtain a fair nor an impartial trial, nor is there any exception urged to the introduction or rejection of testimony, nor to passion, prejudice or unfairness of the trial judge. Under such a state of facts, the decree is conclusive, unless it be shown by appellants that said trial court seriously erred in arriving at its conclusions in making and entering its decision and interlocutory decree, or that an obvious error has intervened in the application of the law, or some grave mistake has been made in the consideration of the facts. Among others, it is held in the following well considered cases that this is the rule.

In

North American Exploration Co. v. Adams et al., 104 Fed. 404,

an appeal from a decree of the United States Circuit Court perpetually enjoining said Exploration Company from diverting the waters of a certain creek, the Circuit Court of Appeals for the Eighth Circuit, speaking through Circuit Judge Sanborn, said (p. 407):

> "It is settled by the repeated decisions of the Supreme Court and of this Court that where the chancellor has considered conflicting evidence and made his finding and decree thereon, they must be taken to be presumptively correct, and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the findings should not be disturbed. Mann v. Bank, 86 Fed. 51, 53, 29 C. C. A. 547, 549, 57 U. S. App. 634, 637; Tighlman v. Proctor, 125 U. S. 136; Kimberley v. Arms, 129 U. S. 512; Furrer v. Ferris, 145 U. S. 132, 134; Warren v. Burt, 58 Fed. 101, 106, 7 C. C. A. 105, 110, 12 U. S. App. 591, 600; Plow Co. v. Carson, 72 Fed. 387, 388, 18 C. C. A. 606, 607, 36 U. S. App. 448, 456; Trust Co. v. McClure, 78 Fed. 209, 210, 24 C. C. A. 64, 65, 49 U. S. App. 43, 46."

In Manhattan Life Ins. Co. of N. Y. v. Wright, 126 Fed. 82, an appeal from a decree adjudging that the complainant was entitled to redeem an insurance policy from a mortgage to the appellant and to recover from the latter a sum of money, it was said by Sanborn, Circuit Judge (p. 88):

> "The legal presumption is that the finding and decree of a court of chancery are right, and

> they should not be disturbed or modified by an appellate court unless an obvious error has intervened in the application of the law, or some grave mistake has been made in the consideration of the facts. Stearns-Roger Mfg. Co. v. Brown, 114 Fed. 939, 943, 52 C. C. A. 559, 563; Kinloch Tel. Co. v. Western Electric Co., 113 Fed. 659, 51 C. C. A. 369; National Hollow Brake Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 716, 45 C. C. A. 544, 567; Mann v. Bank, 86 Fed. 51, 53, 29 C. C. A. 547, 549; Tighlman v. Proctor, 125 U. S. 136; Kimberley v. Arms, 129 U. S. 512; Furrer v. Ferris, 145 U. S. 132, 134; Warren v. Burt, 58 Fed. 101, 106, 7 C. C. A. 105, 110; Plow Co. v. Carson, 72 Fed. 387, 388, 18 C. C. A. 606, 607; Trust Co. v. McClure, 78 Fed. 209, 210, 24 C. C. A. 64, 65; Exploration Co. v. Adams, 104 Fed. 404, 408, 45 C. C. A. 185, 188."

In Big Six Development Co. v. Mitchell, 138 Fed. 279, 285, on appeal from a decree in equity in a suit to cancel a mining lease as a cloud on title, for injunction and for other relief, the Circuit Court of Appeals for the Eighth Circuit, in affirming the decree of the Circuit Court applied

> * * * "the rule so well stated by Judge Sanborn, of this court, in the case of Manhattan Life Ins. Co. v. Wright, 126 Fed. 82, 61 C. C. A. 138, that 'the legal presumption is that the finding and decree of a court of chancery are right, and they should not be disturbed or modified by an appellate court unless an obvious error has intervened in the application of the law, or some grave mistake has been made in the consideration of the facts'."

In American Rotary Valve Co. v. Moorehead, 226 Fed. 202, on petition for rehearing, in answer to the

claim of counsel for appellant that the court in affirming the decree and disposing of the case without written opinion, had expressly or impliedly held "that under the new equity rules, the decision of the trial court upon a disputed question of fact is binding upon the review court", the Circuit Court of Appeals for the Seventh Circuit, in a *per curiam* opinion said:

> "We had no intention of being so understood. Under the new equity rules, as well as under the old ones, the reviewing court has the right, and owes to itself and to the parties the duty, of trying the questions of fact de novo. Under the old rules, the findings of the trial court were entitled to be treated as very persuasive, and such findings were not to be disturbed, unless it appeared quite clearly that the trial court had either misapprehended the evidence or had gone against the clear weight thereof. We conceive that the new rules have made no change in those respects. Cases now are ordinarily to be heard by the trial judge in open court, while formerly they were ordinarily referred to a master. But under either set of rules, if the witnesses have been heard in open court, one element that rightly enters into the reviewing court's consideration of the evidence de novo is the opportunity of the trial judge to estimate the credibility of the witnesses by their appearance and demeanor on the stand. Espenchied v. Baum, 115 Fed. 793."

In DeLaski & Thropp C. W. Tire Co. v. U. S. Tire Co., 235 Fed. 290, on an appeal from a decree in a suit in equity involving patent rights, the Circuit Court of Appeals for the Second Circuit, in its opinion said (p. 292):

> "that while an appeal in equity brings up all the facts for review, there must come a time when the suitors' right to new investigations of complicated occurrences is properly limited to the indication of palpable error, and does not extend to discussion of matters about which all experience shows careful men may differ."

In Butte & S. Copper Co. v. Clark-Montana Realty Co., 248 Fed. 609, a suit to quiet title and to obtain an accounting for ores taken by defendant from complainant's mine, this court, speaking through Circuit Judge Gilbert, affirming the decree for complainant, said (p. 616):

> "The appellant does not assert that the findings of fact are unsupported by competent evidence, but contends that they are contrary to the weight of the evidence. The trial court made its findings after an evidently careful and painstaking investigation of the testimony and the exhibits, and after a personal inspection of the mining properties. We have examined the record sufficiently to see that the findings are all supported by the credible testimony of reputable witnesses. Upon settled principles, which this court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal."

And in

> Columbia Graphophone Co. v. Searchlight Horn Co., 236 Fed. 135, 139,

on an appeal from an interlocutory decree in a suit upon letters patent, this court held that a finding by the trial court will be deferred to on appeal where the evidence does not convincingly point to a different conclusion.

In Martindale v. Waas et al., 11 Fed. 551, it is held:

> "Where main issue which controls result is determined, all others presented by pleadings are, by implication, decided in harmony therewith."

VII.

GENERAL ANSWER TO APPELLANTS' BRIEF.

Appellants' brief is premised on their presumptive innocence and good character, and that an honest rather than a guilty purpose must be presumed. Nowhere is it mentioned, however, in said brief that there likewise is a presumption of innocence and good character applicable to the appellees. The closing paragraphs on page 470 appeal to the court for a clearing of the claimed record and good name of Wm. S. Noyes, in which the other defendants join. After eulogizing this court as a place "where passion and prejudice are unknown and where the transitory storms of the hour are powerless to provoke an echo", there is, we find on analysis of the brief, a direct appeal to arouse the passion and prejudice of the court against the complainants in the suit and in favor of the defendants, the appellants here. Before opening our argument on the facts of the case, we desire to point to what seems to us to be the premises from which the writer of the brief follows his syllogism to a conclusion, hence if his premises are erroneous his argument fails.

First, an attempt is made to besmirch the character of the principal complainant in this suit,

Captain Overton, to impugn his motives, and to aver and reiterate that this is a one-man suit, brought simply by Captain Overton to vent his spleen on the alleged innocent defendants. Second, that Colonel Carl A. Martin, co-complainant, is a blank cartridge, and does not actively appear anywhere in the litigation. That the minority stockholders have given Captain Overton no support. Third, that the stock of the complainants is derivative from General Mills, and donated to both of the appellees without any consideration. Fourth, that the Mills letters indicate active opposition at all times to the installation of a cyanide plant. Fifth, that the Boyd stock was divided between Osborn and Wm. S. Noyes back in 1907, and given to both Noyes and Osborn by Mr. Boyd. Sixth, "control the management" letter. Seventh, that the witnesses Gardiner, Herger and Kniffin were unreliable and their testimony vague and uncertain; that the witness Peat, and all the other defendants in the court below were brilliant witnesses and their testimony unimpeachable. Eighth, claimed excellent equipment and efficiency of employees. Ninth, resulting or constructive trust.

We will take up the several matters seriatim in answering the motive of the brief.

As to the alleged presumptive innocence and good character of the defendants: We know no reason either in law or morals why a presumption should be indulged that one side to the suit has any higher moral tone or better flavored character than the

other side. Nowhere in the testimony in this case does it appear, and the brief presumes considerable when it points to the alleged good character, standing and reputation of the defendants, with their claimed unsullied reputations in the community. A comparison of the defendants and complainants, will show no superiority of defendants, but a great inferiority, if such word may be used, so far as character, reputation and ability is concerned, when we analyze the two sides of this case and consider the defendants' testimony, their acts and deeds covering the past several years' history of the Presidio Mining Company. Who are the complainants, and who is "Mr. Mills" so designated all through the brief? The principal complainant, Captain W. S. Overton, is an officer in the United States regular army (5, 79), with a long and successful career, and honorably retired from active service. Captain (now Colonel) Carl A. Martin, whose non-appearance is so much commented on in the brief, is likewise an officer in the United States regular army (2) and has been for many years in active service (667). During the past three or four years while this litigation has been pending, he has been serving his country and performing his whole duty, which accounts for his inability to be present devoting his time and attention to this active litigation. The statements in the brief that he has never contributed anything to the expense of this case nor lent his moral support, is unqualifiedly false, because Colonel Martin has done both. Who is "Mr. Mills", so sarcastically referred to over and over

again, etc.)? General Anson Mills is likewise an officer in the United States army, retired with the rank of general (665, 580), serving an honorable career over many, many years.

Much has been said about no minority stockholder other than Captain Overton being interested in this fight or appearing in the case. The majority of the minority stockholders reside in distant states (2). It appears from the record and the testimony that Captain Overton by reason of the support of the minority stockholders has been placed on the directorate of this company in spite of the most violent opposition of the appellants and their counsel (354, 377, 579, 592, 771). Captain Overton apexes the movement in this company represented by the majority of the minority stockholders, and he is doing his full duty by them in endeavoring to see that honesty rather than turpitude shall prevail in the corporation affairs.

It is reiterated over and over again that General Mills "gave, donated, presented", etc., stock to Captain Overton and Colonel Martin (brief, 86, 413, 422, 424, 443, etc.) and on pages 86-87 it is stated that nowhere in the record does it appear that the donees paid anything for this stock. It is equally true that there is nothing anywhere in the record that they did not pay for their stock, and it also appears in the record that General Mills' family, including Captain Overton, Colonel Carl A. Martin, the Kline family and Orndorff, paid $60,000 cash for their stock (579), and it is an admitted fact that

not one of the defendants in this case ever paid a dollar for a single share of their stock.

Appellants make frequent reference to Captain Overton's alleged haziness as to the exact number of shares he held, and the attempt is thereby made to show his lack of interest. This effort is based solely on the testimony of Mrs. Overton (wife of appellee) referring to the March 24, 1915, interview with Wm. S. Noyes, where she states:

> "We had forgotten just what stock our family owned, and we wanted to see" (635).

The facts are that Captain Overton's family referred to held many shares, and were scattered throughout the country, as follows (2):

Kathleen C. Kline, Washington, D. C.;

Lelia Kline, Washington, D. C.;

General Anson Mills, Washington, D. C.;

Katie C. Stewart, Zanesville, Ohio;

Samuel Clary and Webster Thayer, Trustees, Worcester, Mass.;

William W. Smiley, Trustee, Thorntown, Ind.;

Colonel Carl A. Martin, Fort Leavenworth, Kansas.

Appellants omitted to refer to Captain Overton's testimony (583):

> "I wrote to members of my family who had large sums involved and purposed to raise a fund for an investigation."

Appellants make the flat statement that Overton has never written to defendants for information as to the company's affairs. This is an attempt to

take advantage of the technical point that the evidence in the lower court does not appear fully in the transcript of appeal. The fact is that Captain Overton has always been a diligent and interested stockholder, and appellants know their statement is counter to the facts, for they themselves attached two of his letters to their answer to the original complaint dated August 31, 1915. Said letters were used in an attempt to prove that he had full knowledge of the company's affairs. On this account we ask the court to refer to Exhibit IV of said answer of defendants, which appears on page 42 of appendix to this brief.

In the light of subsequent developments, this letter shows a withholding of information from a large stockholder, who heard of a cyanide plant from a Mr. Lyons, of Halsey & Co., and who writes the very next day to his own (Presidio) company to ask about it.

The assertions throughout the brief that General Mills was opposed to the installation of the cyanide plant at all times is an effort to confuse the situation in 1907 with that in 1912, and is not based on fact. The evidence is all to the contrary (see Mills' letters, 665, 669). General Mills in writing to the then president, Mr. Boyd, stated that

> "if the country settles down to the business basis of a year ago and silver rises to say 60 cents, I think we might start the cyanide process up at the mine as you suggest in your last letter, saving the expensive transportation" (appendix 44).

General Mills is still a stockholder of this company. But General Mills and Captain Overton are two wholly different individuals, and at no time since Captain Overton became a stockholder has there been any appeal to him for help, either as regards a cyanide plant or in respect to the "impossible" purchase of Section 5.

The assertion likewise is made that the Boyd stock was delivered to Osborn in 1907, one-half of it to go to Wm. S. Noyes. This assertion occurs over and over again (brief, 82, 86, 96, 147, 149, 154, 156, etc.).

It will be noted that the Boyd stock was 57,213 1/3 shares, and it also appears that Osborn was a trustee for 2331½ shares, making the 59,544 5/6 shares which Osborn owned in December, 1912, before transfers took place. On interrogating Wm. S. Noyes regarding the stock transactions (747) it will be observed that Wm. S. Noyes denied any and all knowledge of the 2331½ shares and knew only of the 57,213 1/3 shares which Boyd transferred to Osborn in 1907, though there is a later attempt through an affidavit of L. Osborn to show that Noyes had always owned these 2331½ shares (314). We say there is absolutely no reliable testimony anywhere in this case that this stock of Boyd's was given to Noyes in 1907, and that it stood on the books of the corporation in the name of Osborn until December, 1912, and how can defendants reconcile their answers made individually by Wm. S. Noyes and collectively by the Presidio Mining

Company and all the other defendants, filed in this case prior to December, 1915, where they swear that Osborn owned 59,554 5/6 shares of stock; that he was the largest stockholder of the company, and that Wm. S. Noyes "obtained" 28,607 shares of said stock in 1912 from Osborn. During the argument of the case there was a direct challenge to counsel for appellants to explain the Osborn transaction (341-345) and the trial court remarked (345):

> "Mr. Harding, of course it is not alone to the positive statements of witnesses that we look in a case; it is the inferences that are to be drawn from all the circumstances under which things are done, just as potent, exactly, and usually more so, than the mere unsupported declarations of witnesses. I do not want to do anybody an injustice, but there are some things that must be cleared up in order to relieve my mind of the strong sentiment of wrong here."

We shall advert to these several matters in the course of our argument, but we say here that there is no assumption for this violence to the standards of truth assumed in the constant reiteration in the brief that Boyd gave his stock to Osborn in 1907 with orders to give half to Noyes. Repetition does not make truth, neither does vociferation take the place of cold facts. It might be interesting to note in this connection that Osborn was subpoenaed by the complainants in the court below but did not appear. If defendants were so anxious to prove the alleged truth as they appeared in their motion to reopen the case and have Osborn then come and testify, they could readily have brought him to

the trial of this case (354) to tell the truth under oath as to just what the conditions were.

What is this so-called "control the management" letter, reference to which appears no less than 25 times in the argument? Both letters introduced by defendants (621-624, Defts. Exs. A & B) appear in appendix, pages 39, 40 this brief. An analysis of said letters shows the attitude of mind of a fighting man. It will be recalled that Captain Overton went to Texas with a letter of introduction from Wm. S. Noyes addressed to the superintendent; that after conversations with Gleim at the mine he learned from Gleim sufficient to put him on notice that things were not right between Wm. S. Noyes and the corporation, and investigations were immediately begun. The attitude of Gleim called forth this letter of July 29, 1915, after, as will be observed, Overton discovered that $46 a month was regularly paid from the San Francisco office for a secret service operative known only to Wm. S. Noyes, and also shortly after Osborn had threatened Captain Overton as follows (586):

> "We have got more money than you have got, and if you do this (make a thorough investigation), we will ruin you and make a beggar of you" (586).

One can readily understand that anger and a determination to ferret out crookedness was present in the mind of the writer of the letter. It further is true that this all happened after the return east of Captain Overton in April, the arranging with minority stockholders to finance the investigation

and necessary legal steps, and that he had the backing of the majority of the minority stockholders of this company when he returned (583). Subsequent events prove that this position is correct, because at the first annual meeting permitted to be held after this date Captain Overton by proxies of the minority was elected a director and has remained on the board ever since, in spite of everything which could be done by the defendants to prevent his being there. The other letter, from Overton to Gleim, written on August 10 (commencing page 621), evidences a determination to ferret out secret codes and the methods of Noyes, and also is a request (p. 622) to have a copy of the confidential letter and a translation of the telegram referred to. This letter on page 622 shows that Overton arrived at the mine unsuspicious of Noyes after his interview on March 24, 1915.

There is nothing said in the letter of July 29, 1915, about the control of the management in the sense attributed in the brief. But it states, p. 624:

> "If I ever control the management here I pledge you my word I shall put no spy on you; I would not insult a man so."

The stress as to unreliability laid upon the testimony of Kniffin, Gardiner and Herger is likewise without foundation in fact. For instance (brief, p. 322) it is asserted that Captain Overton threatened the witnesses Gardiner and Herger. Their testimony is directly to the contrary (448, 449, 456, 457). Both emphatically testified that Captain

Overton did not threaten them; that he called their attention to records concerning the last meeting they attended as directors January 29, 1913, and which they immediately pronounced false. Neither Gardiner nor Herger had a motive in testifying falsely, being wholly disinterested witnesses. Their testimony is clean-cut, clear and convincing, and was so accepted by the trial court.

The testimony of Kniffin likewise, also a disinterested witness, when analyzed, will show clear, reliable statements, both as to time, place and occurrences. If Kniffin's testimony and statements that he had been informed of the Osborn shortage the early part of January by Gleim had been untrue, why did not defendants have Gleim contradict the statements made? He was present in court and was called as the next witness, but no effort was made by the defendants to contradict Kniffin's testimony when they had the opportunity.

The testimony of the witness Peat, on the other hand, when read will convince this court as to whether or not his testimony evidences the truth which is attributed to it in the brief. It was the testimony of a self admitted dummy, whose only interest in the company was 10 shares of stock, $25 a month and a free office (895).

All of the witnesses on both sides were seen, heard, their actions observed and their testimony analyzed and considered by the trial court. The oral opinion (417) evidences the court's attitude of mind on due deliberation for one year of the facts, the evidence,

and the law of this case. The credibility of witnesses and the weight of their testimony was all a matter for the trial court, and was duly considered and passed upon.

We likewise find reiterated in the brief no less than 52 times that this was a tottering, bankrupt corporation, pulled back from the brink of bankruptcy by the savior of the company, Wm. S. Noyes, and appellants repeatedly dwell upon the bank overdraft of $3303.72, December 31, 1912 (K. B. Schedule 15 (1008) br. 89). Commencing with January 1, 1913, and continuously thereafter until injunctive relief was applied by the trial court in December, 1915, an overdraft at the bank was a constant and familiar visitor. In the income tax return to the United States government, sworn to by B. S. Noyes and L. Osborn, dated December 31, 1914 (Ex. 14) under 6(a) it is shown that the interest payments made during the year were a total of $1392.79, of which $166.09 was interest on "overdrafts". So 1914 was fruitful of overdrafts.

The year 1915 was worse. In the income tax return (Ex. 15) under 6(a) we find "interest payments actually made during the year" were "various advances from Selby Smelting & Lead Co.......... various sums.........$61.57. Notes and various sums, $304.71, total $366.28".

So the one overdraft of 1912 had grown into interest payments of $166.09 for overdrafts in 1914, and into $304.71 interest payments on notes in 1915, and 1915 was the first time the company had to

draw cash advances on bullion from Selby Smelting & Lead Co. The corporation's funds were kept drained so much by payments made to Wm. S. Noyes under the arrangements perfected the latter part of December, 1912, and the early part of 1913, that the funds flowed into his pockets and all available cash was appropriated by him in furthering his own designs and ambitions. Elsewhere in our brief we touch upon the financial condition of this corporation the latter part of 1912. It will be seen that in 1911 and 1912 the corporation had made a profit of $32,000 (994, K. B. Schedule, 2); that in the month of November, 1912, it had lost $6173.05; that in December it made a profit of $6946.71; that in January, 1913, the month the installations commenced on Section 5, it lost $2377.96 (1073). It will also be observed that in October, 1912, Wm. S. Noyes' annual report had stated the company's plant was in excellent condition. The price of silver was 60 cents; the company had no debts. It had liquid assets $53,461.32 (993, K. B. Schedule 1). To meet this overdraft of December 31, 1912, it had between $5000 and $6000 in cash and about half a month's bullion in transit (some $8000), a total of $13,000 to $14,000 (908). There always was half a month's bullion in transit at the end of the month, so that this overdraft was not a serious matter, neither was this a tottering concern on the brink of bankruptcy. The trial court was satisfied that the property was of great value when Noyes secured control (422). The premises are assumed, however, for the purpose of predicating a state of facts in-

ferring a bankrupt condition and on which an argument can be based and authorities applied, as is so skilfully done in appellants' brief; but if the facts and premises are incorrectly stated and are not true, the argument of necessity falls. Logic cannot supply the place of facts and conclusions based upon false premises must lead to barren results, however attractively they are garbed. The conditions surrounding the occurrences of December, 1912, and in January and February, 1913, prove the company not a bankrupt, and the $3000 overdraft not a serious obstacle nor indicia of bankruptcy claimed so often in appellants' brief. Had integrity been the watchword instead of dishonesty and appropriation and misappropriation of the company's assets and funds, and the proper taking to task been had of Osborn, we dare say that the $10,689.75 could have been recovered, or Osborn's stock seized and sold for whatever it would bring. Proper action in the courts could and should have been maintained to recover the moneys stolen by Osborn from the company treasury, which would have been considerable assistance to the corporation. Instead, this shortage was made the vehicle through which Wm. S. Noyes was able to acquire the Osborn stock through the bonus resolution and the use of the $11,000 shuffled through the front door of the corporation around in through the back door, and in the operation he and his brother B. S. Noyes acquired with company funds all of Osborn's stock but ten shares. This process is admitted in appellants' brief, page 232.

How then can it be said with any degree of accuracy that the corporation was a tottering and bankrupt concern in December, 1912, when the proof shows, as we shall hereafter analyze the evidence and the figures and facts, that the company was prosperous, with a good outlook and a good future, even though handicapped by the double burden of Osborn's peculations in San Francisco, and Wm. S. Noyes' secret profits in Texas. The record likewise shows that at the commencement of litigation the company had an overdraft and continued to have overdrafts for several months thereafter until the injunction was issued; but the claims of Wm. S. Noyes on Section 5 account continued to grow and mount under the pernicious arrangements of the November 19, 1913, contract, so that at the time of the submission of the case there was a showing of liquid assets of $62,000, and a claim by Wm. S. Noyes against the corporation of approximately $80,000 (1058, 1060). The corporation was bankrupt at all times after 1913, and existed only by sufferance of Wm. S. Noyes. It was prosperous before 1913 and never had an indebtedness of any kind or character. Its only creditors were those acquired after 1913, the principal one being Wm. S. Noyes.

Another contention of appellants is based on misconstruction of statement of counsel for complainants in court, that "our whole contention" was that Wm. S. Noyes borrowed the money to purchase Section 5, giving notes for the same, and that they were not paid until a year or a year

and a half thereafter. The brief constantly refers to this one particular feature. The statement was made, as the context of the testimony will reveal, during a discussion as to the cost of Section 5. It referred to the cost of Section 5, and nothing else. We never at any time or place have referred to the purchase of Section 5 as "our whole contention". On the other hand, we have always referred to the general fraud charged against all the defendants, and that one of the elements was the wrongful acquisition of Section 5 by Wm. S. Noyes under all the facts and circumstances. Yet it is constantly reiterated that the "whole contention" of the complainants is that Section 5 was bought with the money of Wm. S. Noyes on his own credit and resources, and that we claim the company provided the moneys to repay the loans, without being able to follow the identical funds into Noyes' pocket and then into the hands of the holders of his notes. We submit such a theorem is untenable. We emphasized our position in our opening argument before the trial court that the theory as stated by Mr. Harding, that we were pursuing Section 5 alone, was not true; that our position was, that we were going into all the affairs of the corporation; that we alleged a constructive trust because of the fiduciary relations and agency of all the directors and officers of the corporation, particularly with regard to Wm. S. Noyes, because we alleged he dominated the corporation. The theory of our case is fraud, and that as one of the results of the fraudu-

lent practices shown, a constructive trust arises as to Section 5.

Further objection is made in the brief to two items:

(a) The finding relative to transfers of stock to Frank M. Parcells and J. D. Ralph;

(b) That the decree interferes with the prerogatives of the holders of the Willis stock in some vague manner.

The contrary from what is announced in appellants' brief (34-36), appears from an analysis of the relation of Parcells and Ralph with this company. The stock transferred to Parcells and Ralph is traceable back through the Noyes brothers to the original 59,554-5/6 shares of the Osborn stock. After the hearing and argument of this case in August, 1916, and in the month of October, the Noyes brothers began to split the Osborn stock into small parcels, and certain shares of the Osborn stock were passed to Frank M. Parcells and to Ralph. An order to show cause and a temporary restraining order was issued, a subsequent hearing had thereon (293), which shows that this stock was a portion of 87,883½ shares in the voting trust, viz., that of Osborn, Mrs. Willis and Noyes, and following the order to show cause, and after hearing at which Parcells and Ralph had full opportunity to present their side of the case, injunctions were issued based upon proper affidavits, preventing the passing on of any of the Osborn stock, but impounding 59,-554-5/6 shares with the Clerk of the Court, sub-

ject to the final order of the court; and until final decree is entered settling and fully establishing the rights of these parties, we fail to see where said Parcells or Ralph have been injured.

(b) Concerning the objections to the relations of the Willis estate and Miss Doherty and the Willis heirs: None of the stock of Mrs. Willis or Miss Doherty was impounded. The decree refers to the transfers made of the Willis stock, particularly the acquisition of 5000 shares thereof by B. S. Noyes without any consideration, as being a part of the illegal and fraudulent schemes perpetrated on the shareholders of this corporation by its majority control. There is no ground for complaint here that we are aware of, surely not such sufficient ground as to warrant a reversal of the decree. But appellants do not seriously urge this point. Nevertheless, we deem it necessary to fully controvert any such points raised by the argument. If there is any merit to appellants' contention, which we deny, for they had a full opportunity to be heard and a full and fair hearing, and the court after deliberation felt justified in taking the steps it did,—nevertheless, if there be any merit to the objection, it is clearly an error without prejudice.

Error without prejudice is no ground for a reversal.

Sipes v. Seymour, 76 Fed. 118.

In Gorham Mfg. Co. v. Emery-Bird etc. Co., 104 Fed. 244, it is said:

> "When the trial court has considered conflicting evidence and made its findings, they must be taken as presumptively correct unless obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence."

These transactions were had a year prior to the decision of this case, and the court had the evidence and the data concerning the hearing relative to the Parcells and Ralph transfers of stock, and we submit that its ruling is presumptively correct on the interlocutory decree. The final decree will settle and determine all the rights of the parties in the case.

Again, the court holds in Nat'l. Bank of Commerce v. First Nat'l. Bank, 61 Fed. 812:

> "Moreover, a careful perusal of all the evidence concerning the admission of which any question has been made has convinced us that, whether that evidence was admitted or rejected, the result in this case must have been the same, and the bill of the appellant must have been dismissed."

The evidence in the instant suit must be considered as decisive on the questions of fraud, for fraud being found, minor details such as those objected to give no ground for a reversal.

> "If every slight defect or slip which a microscopic eye can detect in a question or answer or the charge of the court is to be counted prejudicial error, litigation will become interminable over subtle refinements and quibbles which were not seen or regarded by the Judge or jury at the trial, and which had no bearing whatever on the decision of the case on its merits. Such

an administration of the law would be intolerable. 'But there is nothing', said Judge (now Mr. Justice) Brown, of the Supreme Court of the United States, 'which tends to belittle the authority of the courts, or to impair the confidence of the public, in the certainty of justice, as much as the habit of reversing cases for slight errors in admitting testimony, or trifling slips in the charge. Better by far the practice of the English courts and the Federal Supreme Court, where every intendment is made in favor of the action of the lower court, and cases are rarely reversed except for errors going to the very merits,—errors which usually obviate the necessity of a new trial'."

Quoted in the case of Missouri K. & T. Ry. Co. v. Elliott, 102 Fed. 106.

As to the claimed admission of complainants as to the excellent plant and equipment and high efficiency of the employees at the mine alleged in the original bill of compaint in this suit:

The allegation in the original complaint so much insisted on as precluding the right to a receivership in the instant suit is found in paragraph XVI, page 24 of the transcript, and states that within the past thirty days the prior facts set forth in the complaint were discovered by Captain Overton; that on or about March 24, 1915, he had interviewed L. Osborn and Wm. S. Noyes;

"that thereafter, on his way back east said W. S. Overton stopped at the said Presidio mine in Texas, and then and there first noticed the excellent equipment of said plant and the organization and efficiency of the employees and the operations of said mine and mill. That subsequently, and after conference with the other

> complainants herein" (which referred to the following shown on page 2 of the transcript, to wit: Kathleen C. Kline and Lelia Kline, residents of Washington, D. C.; General Anson Mills, a citizen of El Paso, Texas; Katie C. Stewart, a resident of Zanesville, Ohio; Samuel Clary and Webster Thayer, trustees, who reside in Worcester, Massachusetts; and William W. Smiley, a trustee, who resides in Thorntown, Indiana); "said W. S. Overton returned to San Francisco about July 5, 1915, and examined such minutes and books as were to be found in the company's office in San Francisco, where he discovered that many of the documents, papers and records relative to the company's affairs were in the private possession of Wm. S. Noyes in the Mills Building, San Francisco;"

which is followed by allegations in said paragraph XVI relative to the necessity for sequestration of the books and records of the company.

This statement as to the equipment at the mine refers to the attitude of mind of a non-resident stockholder not familiar with mining operations, who from all the reports and information obtained from time to time during his connection with the company supposed that the corporation had a small, inferior, equipped mine and mill; and here he notices that there is a tremendous amount of equipment, machinery, a large number of operatives employed, and in stating such observations he alleges that he first noticed the excellent equipment of said plant and the organization and efficiency of the employees. There is a great difference between a few of the principal officials of the company domi-

nated by Wm. S. Noyes in San Francisco, and the rank and file of the employees, principally Mexican labor, out in the hills of Texas. The rank and file of the actual laborers of this corporation undoubtedly have always earned their pay and have given actual services for compensation received. This, however, cannot be construed to have such a serious and far reaching effect that said statement made under the facts and conditions precludes the appointment of a receiver or the granting of injunctive relief, notwithstanding any showing of gross, palpable and proven fraud of the most malignant type. Further, this was long before the discovery of any of the hidden concealments showing the thefts by Osborn, the fraudulent entries in the books, the falsification of the minutes of January 29, 1913, the false system of assaying, the dollar differential, or the side profits made by Wm. S. Noyes.

It is insisted all through the argument that the original theory of the complainants was one of a resulting trust as to Section 5. The theory of complainants always has been that there was gross fraud perpetrated upon the corporation and its minority stockholders by the majority as the company directors and officers, confidential employees and agents; that they jointly and severally participated in a fraudulent conspiracy and scheme to defraud, with full knowledge of the facts, with the deliberate intention of defrauding the corporation and the minority through the domination and con-

trol of Wm. S. Noyes; that out of this mass of fraud evolved the acquisition of Section 5 under such circumstances and conditions as imposed a constructive trust under all the principles of equity jurisprudence, whereby the corporation became the real owner of the property; that Wm. S. Noyes held the same in trust for said corporation subject to its purchase price. Paragraph XIII of the original bill of complaint, commencing on page 7, transcript, and paragraph XIV commencing on page 18, all set out the theory, showing wrongful acts on the part of defendants, and on page 20 it is set forth that Wm. S. Noyes in his own interest and in derogation of the rights of stockholders, made large sums of money from his connections with Section 5, and otherwise while conducting the corporation affairs as its manager at a salary of $5400 per annum; that he had transferred to himself Section 5, knowing that it should have been purchased with its own funds and resources and transferred to the Presidio Mining Company from the Silver Hill Mill & Mining Company. And then the further allegations follow:

> "That your orators are informed and believe and upon information and belief allege, that said Wm. S. Noyes received from the treasury of this corporation more than sufficient funds and moneys with which to pay for said Section 5 aforesaid, and at the times when payments were made by him for said Section 5 and on information and belief your orators aver that the moneys received from said Presidio Mining Company, as aforesaid and paid to said Wm. S. Noyes by said corporation, were greater

> in amount than the moneys which he paid to said Silver Hill Mill & Mining Company therefor."

Then follow further allegations that Noyes was authorized to collect the sum of $45,000 by the bonus resolution, and that he should receive the said sums as fast as the corporation treasury could stand the withdrawals; and that he maliciously and deliberately kept the corporation drained of funds by virtue of the resolution knowing it to be a fraud; and on information and belief it is further alleged (p. 21) that he used a part of said bonus to purchase the entire Section 5, and that the entire price, it is alleged on information and belief, of said Section 5 was not in excess of $25,000.

These and other allegations follow along the same lines, and they must be construed in connection with the entire complaint and not lifted from the complaint and isolated, and from said isolated lifting a syllogism developed on said premises, from which the conclusion is erroneously drawn that this was the one and sole question in the case, and that there is alleged only a resulting trust.

It will be observed in going through the record in this case that the facts were ascertained progressively: First, there came the suspicions at the mine on the first return trip home by Captain Overton the end of March, 1915, ripening into a conclusion that the company had been defrauded by Wm. S. Noyes; the consultation with the eastern stockholders, the financing of a return trip after

said consultation, showing that it could not possibly be a "one-man suit", but representative of a part of the minority stockholders whose investment in the corporation stock was $60,000. The return to San Francisco and the investigation, and the discovery of a portion of the truth with regard to the approximate cost of Section 5; the filing of the amended bill; then followed the discovery of the shortage of Osborn, the manipulations of the company books, falsification of minutes and records, by which time additional proof had been brought to light. Then followed the supplemental complaint setting forth these additional facts discovered through all these months of patient investigation and search both in San Francisco and Texas, notwithstanding the concealment of records and refusal to allow free access to the books of the corporation, and blocking by actual orders from the president in San Francisco of full investigation at the mine in Shafter. These are all matters embodied in the pleadings contained in the amended, and particularly the supplemental complaint. We submit that the entire record, together with the proofs adduced during the trial of the case, clearly show not a resulting trust, but a constructive trust as to Section 5, and actual fraud, so far as the falsification of the records and minutes and acts and doings of the Osborn stock transfers is concerned.

The objections made to the complainants' pleadings are laid as a foundation in appellants' argument, and the premises assumed that the burden is

entirely upon the complainants to trace the trust funds into the pockets of Noyes and then through Noyes' pockets again into the hands of the parties to whom he distributed moneys in payment of notes. The rule undoubtedly is that in matters involving trust funds where there are no features of fraud such as are involved in this suit, it is necessary in order to recover, to trace the said trust funds and follow each step in the process from the time the moneys left the coffers of the complaining party until they reached the hands of the ultimate distributees. But we feel safe in asserting that no case can be found where a scheme of fraud such as exists in this suit was uncovered growing out of fiduciary relations where such a rule has been followed. The rule is that the burden of proof to show fairness is upon the directors and officers of a corporation, and particularly upon a man in the position of confidence and trust such as was Wm. S. Noyes in his relations with the company as its sole and exclusive managing agent of mining affairs in Texas prior to 1913, and subsequent to 1913 the sole dominant control of all its operations, both here and in Texas. Under such facts we believe the burden of proof is clearly upon all the defendants, and particularly upon Wm. S. Noyes. We are sustained by numbers of cases, particularly the cases relating to fiduciary relations of an agent and confidential manager such as Wm. S. Noyes was, and particularly touching secret and concealed profits such as Noyes made through contractual relations exist-

ing between his principal, the corporation, and third parties. See

U. S. v. Carter, 217 U. S. 305-310.

VIII.

PRINCIPAL ARGUMENT OF APPELLEES, WITH ANALYSIS OF FACTS.

In this main portion of our argument we address ourselves to the following:

1. General survey of the conditions existing prior to January, 1, 1913:
   - (a) Company plant;
   - (b) Price of silver;
   - (c) Finances;
   - (d) Liabilities;
   - (e) Credit;
   - (f) Wm. S. Noyes' finances;
   - (g) Relations existing between the several defendants and Mrs. Willis.
2. Fraudulent manipulations:
   - (a) Acquisition of Section 5 by Wm. S. Noyes;
   - (b) Acquisition of the Osborn stock and control of corporation by Wm. S. Noyes;
   - (c) Management of the corporation since December, 1912;
   - (d) Secret side profits of Wm. S. Noyes.

3. Witnesses:

(a) Attitude of defendants;
(b) Conflicting testimony;
(c) The $3500 transaction.

Company Plant.

In 1912 the company plant was in good condition. In Wm. S. Noyes' annual report to stockholders dated October 1, 1912, he states (600):

> "The machinery in the mill having become badly worn through continued use, it was necessary during the year to install a new oil burning engine at a cost of $17,392. This will effect a large economy in operating expenses. In addition, the mill and other buildings required extensive repairs and all these consumed the the operating surplus for the year and drew some on the available cash reserve. These extraordinary repairs are about completed, and the company's plant is now in most excellent condition.
>
> The mine has just about maintained its own in respect of quantity of ore reserves, but the grade, or silver contents of the same, is perhaps a little lower than at the corresponding period of 1911.
>
> Yours very truly,
> Wm. S. Noyes, Superintendent."

This excellent plant is the one that, within sixty days thereafter, Noyes decides to tear down in favor of a cyanide plant. Was this sudden decision to install the cyanide plant due to a drop in ore values "the ores goes up and down; it always has done so"; B. S. Noyes' test. (1059), or was it due to the fact that Noyes in November learned from Gleim he could acquire Section 5?

In the above letter Noyes reports a net profit to the company of $17510.14. In 1911 and 1912 the company had made a profit of $32,823.32 net (K. B. Schedule 2) (994). The schedule shows that the company had been treating 19-ounce ore and better during those two years. Noyes knew of these values. In the crucial period from November 1, 1912, to April 30, 1913, there was a profit from both sections of $23,379.33 (Defendants' Ex............, 1073), nearly equal to the total purchase price of Section 5. During said period the pan-amalgamation process was used, with a consequent high treatment cost. The cyanide installation was perfected and put into operation in August of 1913, whereby it is claimed that costs of operation were nearly cut in half. Nevertheless, the corporation has never made a profit since the cyanide plant was installed (Wm. S. Noyes got it all), but did make a profit with the pan-amalgamation method.

Price of Silver.

From 1897 up to 1912 silver reached 60 cents but twice, i. e., 1906-1907. In 1909 it dropped to 49 cents. Thereafter it steadily rose up to and including 1913. In 1912 the average price was .5696, but it was:

.6126 Sept.-Oct., 1912 (Wm. S. Noyes' table of prices, Tr. 715).

6110 Nov.-Dec., 1912 (Wm. S. Noyes' table of prices, Tr. 715).

These figures show that the price of silver was at its zenith during the so-called "precarious" period so much emphasized by the defendants.

Finances (K. B. Schedule 15. (1008).):

On November 30, 1912, the assets were:

Cash in bank	$ 8,380.91
Bullion in transit	10,605.03
Supply inventories	22,752.15
Miscellaneous:	
Drafts	450.00
L. Osborn	10,689.75
Total assets	$52,877.84

Liabilities.

Current:	
Mine cash overdraft and unpaid invoices	$11,612.44
Net worth	$41,265.40

One month before this the report to stockholders had stated the company's plant was "now in most excellent condition". A company with a plant in most excellent condition and with assets exceeding by $41,265.40 all its liabilities, is in a good financial condition. It is further evident that with an operating cost of $9.50 per ton and a profit of $32,-000 and upwards during the preceding two years under said system, and with a cyanide plant installed which would cut the cost approximately in half, the future of the company from a financial

standpoint was certainly good. It was a solvent, going concern with a good future ahead of it, all of which was well known to Wm. S. Noyes, the only man who did know the real existing conditions and possibilties of the company's plant and property.

Credit.

The credit of this company was undoubtedly good. The El Paso Foundry & Machine Works extended a credit of $12,061.60 for new machinery and equipment. This concern for years had done business with the corporation and always received its money. E. G. Gleim loaned the company $14,000 to assist in the new development. He was one of the principal men in Shafter most vitally interested in the company's welfare, for he was the sole owner of the E. G. Gleim Company store (731, 745, 775), which lived on the miners' trade, which was so valuable that he paid Wm. S. Noyes monthly commissions for the business secured from the corporation employees (773). Mr. Gleim had grown prosperous through his connections with the corporation and the trade given him through Wm. S. Noyes' agency as sole representative of the corporation. Gregg & Gleim are alleged to have advanced a credit of $16,000 on the tramway, commenced in September, 1913. Said Gregg & Gleim for years had been hauling the company's ore at a rate of 85 cents per ton, likewise through contractual relations negotiated by Wm. S. Noyes on behalf of the company. Wm. S. Noyes bound the corporation to pay them

a profit of $9000 (604) as a bonus on the loan, and then had the company bind itself under Noyes' direction to pay ten per cent per annum on the $16,000. The trial court in its oral opinion (421) holds that the tramway transaction had a peculiarly shady appearance. These were all obligations of the Presidio Mining Company. None were incurred as a personal liability of Wm. S. Noyes. He used the corporation to install the cyanide plant on its own credit and responsibility. From the time it started to operate the Presidio Mining Company lost money continuously, while Wm. S. Noyes obtained all the benefits. In addition, during the time of this alleged financial stress on the part of the corporation, Wm. S. Noyes drew from the company treasury during the year 1913 more than the purchase price of Section 5, and laid the foundations for the obtaining of all the assets of the corporation in the future.

Wm. S. Noyes' Finances.

On page 137 of this brief we show the times of payments for Section 5 stock by Noyes, aggregating $24,009.33; on page 138 the times of repayment of notes given by which the money was secured to pay for such Silver Hill Mill & Mining Company stock, and the times and payments of withdrawal of funds from the Presidio Mining Company by Wm. S. Noyes. He had no ready money of his own in December, 1912 (Tr. 186, 213). He had 1382 shares of the capital stock out of 150,000 shares. His financial condition was such that it was an impos-

sibility for him to borrow money on his own credit with which to either acquire Section 5 for himself or operate it after he had acquired the same. The evidence is clear and convincing that he borrowed the $10,000 from Benton Bowers, an interested party with him in transactions of the Presidio Mining Company; $10,000, from the bank, putting up as collateral the stock he had taken from Osborn in December, and gave the $5000 note to Harry Young, who would likewise be a participant in benefits which Noyes could give him in Shafter through company business and company operatives purchasing from the Young store (745). Men do not plunge into transactions of this sort involving the outlay of thousands of dollars without a foundation on which to build; neither do bankers nor business men give credit to an individual such as was here extended without a positive assurance of repayment. Self-interest precludes risks of this sort. Each and every one of the parties loaning money to Wm. S. Noyes knew that Noyes had the backing of the Presidio Mining Company, that it was a prosperous concern, that Noyes was the sole managing agent with whom they had always dealt, that his favors had been bestowed upon them, and they expected a continuation of the same. It is clear from the evidence in this case that Wm. S. Noyes would not have had the support of these various parties without the corporation itself assuming responsibility, and this responsibility was assumed by the corporation.

Relations Existing Between the Several Defendants and Mrs. Willis.

When Wm. S. Noyes left for Texas in December, 1912, we are satisfied, and so was the trial court, that he knew of the Osborn shortage and had Osborn in his control. The transfers in December of the 28,607 shares of stock, the splitting of these 28,607 shares on January 9, 1913, into 10,000, 5000, and 13,607 shares respectively, and on the same date the splitting of the Osborn certificate into 10,000, 5000, and 13,606⅓ shares respectively, in San Francisco, while Wm. S. Noyes was in Texas, and only a few days before the deposit of Noyes' share of this stock with the Marfa Bank as security for the $10,000 loan, indicates a collusive operation carried out in San Francisco by the brother, B. S. Noyes, operating with Wm. S. Noyes in Texas prior to the alleged date of the discovery of Osborn's shortage by Noyes, namely, January 19, 1913. The acts of the parties indicate that the Osborn shortage was known to Noyes before he went to Texas in December, 1912, and that he took the 28,607 shares from Osborn with a preconceived idea and plan subsequently carried out. Mrs. Willis looked to Wm. S Noyes for information (817, 818). She was an aged widow. On January 23, 1913, Wm. S. Noyes wrote the Willis letter, holding out to her inducements that she would receive dividends of approximately 50 cents per share per year if she allowed Noyes to carry out his plans, coupled with the condition that a new board of directors should be elected. She being the owner of 36,956⅔ shares of stock, with

an income dangled before her eyes of over $18,000 a year, naturally would consent to almost any arrangement made by Wm. S. Noyes.

The evidence shows that under the sudden surprise concomitant with the announcement of the Osborn shortage, this aged widow, in not too affluent a financial condition, indicated by her offer to turn over her stock if it would help (810), was ready to submit to almost any plan. She was an easy prey to these two brothers. Observe Wm. S. Noyes' statement to her, "I told Mrs. Willis that if it ever got out the company was gone" (693). She did not consult independent disinterested friends or counsel (689, 693). Surprise and sudden action were the chief ingredients in her course of conduct. Due deliberation was wanting. The letter dated January 23, 1913 (537), the interview of B. S. Noyes about the same time (906), the removal of the old directorate, the appointment of the Noyes brothers and Miss Doherty, the companion of Mrs. Willis, followed within a week from the date of the letter written by Wm. S. Noyes in Texas after he had perfected his plans there. Shock, bewilderment, sympathy, prospective loss, confidence, persuasion, money, all played their part upon this aged widow's mind. Before another month was over, she had parted with 5000 shares of stock taken from her under these circumstances by B. S. Noyes, the brother, without consideration (911), but after aiding his brother, Wm. S. Noyes, in his manipulations. Miss Doherty represented Mrs. Willis, and

thereby reflected Mrs. Willis' attitude of mind. She testified (817):

> "Mrs. Willis and myself relied entirely on the suggestions and statements of Mr. William S. Noyes as made to us both—relied absolutely; she had every confidence in him; I relied entirely upon his judgment."

And on 819 we find:

> "The Court—What was suggested as to the purpose of that (voting trust), desirability of it?
>
> A. As well as we understood, it was to give Mr. Noyes the majority.
>
> The Court—The control?
>
> A. Yes, the control of the stock, I believe."

Peat was a dummy working for a salary under the control of Wm. S. Noyes. Gardiner, Herger and Fish, the majority directors, were never notified of any of the facts and conditions (444, 454), but were summarily dismissed, the present defendants then taking office.

With this general survey of the conditions, we now advert specifically to the facts and circumstances developed by the pleadings and proof in this suit touching the fraudulent transactions, comprising three principal features:

2. Fraudulent Manipulations.

A. Acquisition of Section 5 by Wm. S. Noyes;

B. Acquisition of the Osborn stock and control of the Presidio Mining Company; and

C. Manipulations, acts and conduct of all the parties defendant generally under the

control of Wm. S. Noyes subsequent to December, 1912.

D. Secret side profits of Wm. S. Noyes.

The sum total of these features, together with the adherent facts, circumstances, conditions and results develop a most shocking case of fraud. In our search through the decisions we found no such glaring fraud as exists in this case, perpetrated upon the corporation by a single individual, with concurrent manipulations, conspiracy and collusion, such as participated in by all the defendants in this case,—a gigantic fraud so controlled and operated that all the profits which could be made under the system devised adhered to the pockets of Wm. S. Noyes, and, in proportions dictated by him, to the others assisting in its perpetration. There is only one fraud. It is composed of three principal features. We touch now upon the first of these:

(a) Acquisition of Section 5 by Wm. S. Noyes.

Appellants' brief (pp. 155 to 306 inclusive) deals with Section 5. We shall touch on the principal features of appellants' argument, and then pass to a statement of the facts and circumstances as revealed during the trial of the case. From the evidence we submit may be deduced the true principles of law, which are simple and clear. The citation of numerous authorities on each independent point does not enable us to arrive at the truth unless we assume the correct premises and the actual facts as they existed on which to build our syllogism and from

which we must deduce our conclusions in order to properly apply the law applicable.

In the first place, Section 5 and Section 8 are practically one property, separated only by an imaginary line (see Defts. Exs. LL and MM). The history of both sections was well known to Wm. S. Noyes, as he had operated Section 8 for 29 years in December, 1912, and Section 5 for many years as well, and during the period of operation of both properties the ores from both sections were treated in the one mill, likewise under the direction of Wm. S. Noyes. The geological character of both sections is the same. The ores are found in limestone replacements. On page 80 and 203 counsel speaks of the property as being a "pocket mine". From this statement, unless explained, it might possibly be understood by the court that this pocket mine, so-called, resembled, or was similar to what is ordinarily known in California as a pocket mine. As a matter of fact, the deposits in this property are replacements in limestone ranging from a mere streak to immense kidneys or lenses of ore containing thousands of tons. For instance, the ore body in Section 5 later known as "Stope 13", Mr. Noyes and Mr. Gleim both testified was estimated to contain from 10,000 to 20,000 tons of ore, with a value anywhere from $100,000 to $400,000. Mines containing ores of this character and nature are not properly designated "pocket mines", as the term is ordinarily understood and accepted in California.

Appellants' brief, page 155, predicates as facts on which to build the foundation for all the future

argument, that the early vicissitudes of the property were known; that Noyes bought the property with his own funds; that there was publicity given to the purchase, to the leading stockholders directly at the time of its acquisition, and to all stockholders by the annual report of 1913. There never was a report to any stockholder, nor any annual report sent to the eastern stockholders, showing that Noyes paid $24,009.33 for the property, or any other sum. This ultimate fact was finally developed by Wm. S. Noyes when he had no other recourse, and it was forced from his lips by the complainants' efforts.

It is also claimed that Wm. S. Noyes offered to convey Section 5, and that the company could not purchase the same because of financial disability. None of these grounds are well taken, as the facts in the case disclose: In the first place, the corporation was in good financial condition, as we have heretofore shown. Wm. S. Noyes was not in good financial condition,—he had no credit except as it was developed through the company associations and through its support. The parties from whom he borrowed the money were expectant participants in continued company business and profits derived therefrom. The information Noyes had was only made possible through his company connections and years of service. He alone knew the conditions. He was receiving a liberal salary. Everything acquired by him in addition to his salary under these conditions belonged to his principal, the Presidio Mining Company. His governing purpose (brief p. 156)

was not the rehabilitation of the company, but was the laying of foundation for his own enrichment to the detriment of the stockholders of the company. "That he violated no duty to the corporation (p. 163) and could likewise enter into independent competitive business" is not the rule under the circumstances.

In dealings between the corporation and its principal director, such as here existed, with Wm. S. Noyes on both sides of a contract between himself as the owner of Section 5 leasing to the company, which he controlled (for he dominated Osborn and controlled the acts of Mrs. Willis), and then after making this lease between himself and the corporation he obtained the bonus resolution of $45,000, the primary object of which was to guarantee the necessary funds with which to repay his promissory notes given, and control the corporation stock through the concealment of the Osborn shortages of $10,689.75, which defendants finally divulged, and then subsequently in November of said year again making a contract betwen himself and the corporation through his biddable and pliant board of directors, whereby he laid the foundation for the pernicious system of the false assaying and the dollar differential, the remedy applied by the interlocutory decree and the order appointing a receiver was an absolute necessity.

In the case of Cowell v. McMillin, 177 Fed. 25, so much relied on by appellants, the decision of the trial court was in favor of the defendants. The

appellate court affirmed the decision. A reading of said case will disclose that Cowell and McMillin were competitors in the lime business; that McMillin dealt with disinterested trustees, who acted fairly and were business men of capacity and standing in the community. The value of the patent machine to make barrels was often discussed by an agent of the inventors with all the trustees. Said agent spent two months in Roche Harbor where the corporation officials resided. The matters were discussed by the directors among themselves a number of times with McMillin between September, 1890, and March, 1891, a period of six months. McMillin said he did not want to take up the invention for he was the president of the corporation, and if it should prove to be a good thing it ought to belong to the company. Whatever was to be done he stated should have been done by the company. The directors decided that McMillin could take the invention (36) and experiment with it, for its value was not determined as to its adaptability in handling Washington timber. That the first machine was not a success; that in September, 1892, fire destroyed the stave mill and the machine. Then McMillin ordered a new machine built. The trustees were familiar with all these negotiations. On page (37) we find it stated that time and again McMillin urged the company to take up the machine. He talked of his relations with the company and of his delicate position in the matter. Cartwright, the bookkeeper, testified that McMillin was very anxious for the company to take over the machine. It was held there was no concealment

by McMillin. It also appears that McMillin owned a large block of the stock of the corporation, and finally bought out some of the others, paying them real money. The court holds (p. 38) that the purchase of this stock was immaterial unless the facts and circumstances surrounding such purchase tended in some way to show fraud on McMillin's part, or conspiracy between the associate directors and McMillin to serve McMillin at the expense of the corporation, and complainant's interest when the contract was made.

After discussing the accounting features of the case the court holds (p. 39):

> "That McMillin acquired the title to the barrel machine in good faith, with the knowledge and consent of the board of directors, and after the board knew of the merits of the machine and had expressly refused to become interested in it; that there was no concealment from the board of directors on McMillin's part; that McMillin made a lease of the property and the contract for supplying barrels in good faith, and that the contract when entered into was not unreasonable, unfair or illegal."

The court then announces the very rule we are contending for in this case:

> "We would not, to the slightest extent, depart from the salutary rule that directors and other officers of a corporation, occupying a fiduciary relation towards a corporation, are not permitted to assume positions which will bring their private interests into conflict with their duties to act solely in the interests of the corporation; nor would we argue upon the wisdom as well as the morality of the doctrine that

where a corporation has made a contract with one of its directors, or a contract wherein one of its directors is personally interested and the interested director has taken part in the making of the contract, the corporation may elect to avoid the agreement so made, even though it is in fact free from fraud. But these principles are not those which control this present case, for here the transaction, when viewed as a whole and in its several parts, between the director and his company, was entirely free from fraud, and the contract was unanimously authorized by a board of disinterested persons, the interested director not voting."

After further discussion the court states (40):

"We may say, too, our examination has been had under the conviction that the transactions involved should be very closely scrutinized, and that it has devolved upon McMillin to show that his conduct was honest, candid, and free from wrong."

Speaking of the votes of directors by which increases of salary were given McMillin, the court holds (p. 41):

"We find no satisfactory fact upon which to base a conclusion that the trustees who voted to increase McMillin's salary acted either corruptly or under a false motive. They were men of business standing, holding very responsible positions in mercantile affairs, and it is not unreasonable to believe that their action as directors was prompted by no course other than careful regard for what seemed to them to be the interests of the corporation."

As to concealment from the minority stockholders (p. 41) it will be seen that in January, 1895, com-

plainant knew of the lease made and its contents. In 1903 he employed an expert and five months were consumed in going over the corporation affairs. It also appears (p. 42) that another lease was made to run to 1908. Ratification of the lease by stockholders took place after all these facts were known and proper notice given. Naturally the decree of the lower court was sustained.

We submit that the facts of this decision speak for themselves, without extended argument. In the McMillin case no fraud was found by either the trial court or by the appellate court on complainant's appeal. In the instant suit we have fraud found by the trial court on all grounds complained of.

The directors were the thief Osborn, the dummy Peat, who had signed Osborn's embezzling checks; B. S. Noyes, the attorney at law, the confessed errand boy of Wm. S. Noyes and chief assistant in concealing the Osborn shortages, and who likewise helped himself to the Osborn and Willis stock to the extent of over 10,000 shares, and the echo, Miss Doherty, a pliant tool in their hands. This was the board of directors which distinguishes their actions from those of the board of directors in the McMillin case. Nevertheless, a number of pages are thereafter devoted to a discussion of this case, in an effort to bolster up the defendants' position. Who could protect the rights of the Presidio Mining Company? Yet on page 189, brief, we find asserted that there is no proof here that the Silver

Hill stockholders would have dealt with the Presidio Mining Company; that the sale was a cash transaction, and that the Presidio Mining Company had neither cash nor credit. Nothing could be more misleading than this statement under the facts of this case for the only credit, standing and reputation existing at this very time was that of the Presidio Mining Company. It had no debts. It had $51,000 of liquid assets. It had a plant and equipment and it had a good mine. Wm. S. Noyes had 1382 shares of the stock, and no assets and no credit of his own. All that he had was derivative from his connections with the Presidio Mining Company.

The claim alleged to have been asserted by complainants, that Mr. Noyes should have purchased Section 5 with his own funds, under the circumstances likewise predicates a false premise. The citation of Teller v. Tonopah R. R. Co., 155 Fed. 482, 483, 484 (discussed on pages 199, 200, brief), is not applicable to the facts in this case. The discussion in said case is construed by appellants in a manner to mislead the court without a careful examination of said case. The principles involved have been distorted to fit said case to the facts in the instant suit. An analysis of that case will show, first, the syndicate in the Teller case put up real money; there were 32 individuals composing said syndicate; ten of whom were directors in the defendant corporation, and they held less than a majority of the stock; second, the majority stock-

holders of defendant corporation ratified the deal, complainant being the only one objecting; third, it was of great benefit to the defendant; fourth, the complainant expected the directors who had means to put up their money for his benefit; fifth, the transactions were all fair and open. There is a very great difference between these features of the case and the construction sought to be placed upon it by appellants.

Wm. S. Noyes bought Section 5 on the credit, reputation, and financial standing of Presidio Mining Company. He could not have bought Section 5 on his own credit, with his own funds, for he had neither as an individual, but as the sole confidential agent of the Presidio Mining Company he could get both.

The argument that Section 5 was not immune from characteristic conjecturalities of mining (brief p. 203) is true to a certain extent, so far as applied to mining generally. But Section 8 had been operating continuously for 29 years, under the control of Wm. S. Noyes, familiar with all its ramifications and underground conditions, and also familiar with Section 5 adjoining. The examination in December, 1912, of said property, after tying up the Silver Hill stock, made by both Gleim and Noyes, thoroughly satisfied both said last named as the officials of the company what the possibilities with said Section 5 were in conjunction with the equipped mine and mill of the Presidio Mining Company. There was no conjecture about it, for

they had a body of ore worth from $100,000 to $400,000 (568, 686). With a plant to treat the same the results were certain. There was nothing conjectural about it.

The testimony of Wm. S. Noyes evidences a very substantial body of ore exposed in Section 5, which he described as follows:

> "I found Section 5 just as I had left it in 1897, when I closed it down for the Cibolo Creek Mill and Mining Company, with the exception that the engineers that had been examining it for the New York people had run two drifts and opened up a new pocket of ore that had not existed when I left the mine, or was not known when I was last in the mine. We ascertained the possible extent of that body of ore as much as we could. Two drifts or crosscuts were run at angles with each other like an 'X' and a winze sunk about 30 feet and an upraise into a place up on the level above, so that the exposure of ore was about 80 feet in the drift, and I should say, guessing roughly, 50 or 60 in the crosscut. Ore showed 30 feet down that winze. From that as I always have to do in these pocket deposits I made a rough guess that it might contain anywhere from 10,000 to 20,000 tons of ore, depending upon the outline of the ore body, which in these pockets of limestone is very largely conjectural" (686).

In a report to Mr. Boyd, February 16, 1907, he wrote:

> "Experience has shown in working this mine that it has always yielded two or more times as much ore as could be actually measured. * * * I want it clearly understood that I am expressing an opinion based on twenty-two years' experience with the mine" (662).

Mr. Noyes knew what could be done and that Section 5 was a valuable property. He made no such disclosure of facts to the stockholders, in the premises, as the law requires of one standing in the confidential relation he did to his principal, the corporation.

In his dealings with the company relative to Section 5 defendants next urge that Wm. S. Noyes was entitled to make a fair profit under all the circumstances. Had Wm. S. Noyes done his duty he would have secured the property for the corporation, and not manipulated the control of both Presidio Mining Company and Section 5 into his own hands; for he installed a cyanide plant on the company's credit, reduced the operating cost approximately one-half, but arranged the transactions, so far as division of income was concerned, so that the losses from Section 8 were sufficient under the system devised to absorb all the profits which the company was alleged to make from Section 5, so that all profits flowed into his pockets. with no possible relief to the corporation stockholders other than those whom he would favor.

It is true that no obligation rests upon a stockholder or director to make a disclosure of his private transactions (Br. 209), yet the facts of this case show that there was secrecy as to all vital matters connected with the acquisition, the purchase price, and the manipulations of the property by Noyes. Page 212 of the brief enters into a discussion of certain absurd extra-territorial excur-

sions to convey books and records to non-resident stockholders of the corporation for their inspection, and further states on said page that by reading the minutes of the meetings any stockholder could fully understand the whole situation and Noyes' relation to Section 5. The minutes of this meeting on January 29, 1913 (577), were prepared on the 28th of January by B. S. Noyes, the attorney, on the assumption that director Fish would be absent, and whom both Gardiner and Herger testified was present. This was the meeting in which the first lease was adopted, showing the method of preparation for succeeding events, which the brief alleges could be fully ascertained by reading the minutes. Other misstatements occur which are hereafter referred to, not only in this instance but in others connected with said minutes.

The bonus resolution of February 15, 1913, is referred to in the following language by the trial court (422):

> "This so-called bonus resolution, I think, was as bald a fraud as has ever fallen under my observation. It was without any character of fundamental right in its inception. And, of course, the finding being that the title to this Section 5 should really be in this corporation, all the benefits that accrued to Wm. S. Noyes from that transaction, as well as the subsequent lease which I hold likewise to be void, must be accounted for."

Pages 213 to 215 of the brief discuss the duties of foreign residents to come and see the corporation books of the company. The records of the corpo-

ration only disclose what Wm. S. Noyes desired. We defy anyone to find the Osborn shortage mentioned in any of the records or mentioned in any of the financial books or records of the corporation up to the time of the commencement of this litigation. The annual reports are discussed, commencing with page 219 Br. The annual report of October, 1913 (Comp. Ex. 17) on page 4 sets out the following (629):

> "Early in 1913 Section 5 adjoining the Presidio Mine was on the market for sale. This company being unable to buy it having exhausted its credit on the new installations before mentioned, it was purchased by the writer and an agreement made whereby this company will work it on terms of a division of the net, and perhaps will purchase the same later on. Late developments in Section 5 indicate that it will be a source of large revenue."

It will be noted that this report says that Section 5 was on the market early in 1913, when as a matter of fact Wm. S. Noyes had been arranging its purchase since November of 1912 and actually acquired it the first month of 1913. He had discussed it with Osborn in November, 1912. He also had conversations with Mrs. Willis (682-3). He obtained the first option on Silver Hill stock about December 20, 1912 (685). Where is there any information given to a distant stockholder which would in any way inform him as to what had happened? What could the stockholder know of the $25,034.10 already paid to Noyes on Section 5 account, when the report puts it that the company

"*will*" work Section 5 on terms of a division of the net? What could he know of the definite value of Section 5 by such information as "*Late* developments in Section 5 indicate that it *will* be a source of large revenue"?

Then in October of said year the change in date of annual meeting was made to February of each year, so that no report would be sent until 1915. This report for 1914 reached the stockholders about the first of April, 1915; so that no information was obtained or could be obtained by a distant stockholder trusting in the company management and integrity of its officials for a period of time from October, 1913, until nearly a year and a half, and which report showed, when received, an indebtedness of the corporation for the first time in many years, in the words following (Comp. Ex. 18, p. 2):

> "In addition to these ordinary debts, there is due the writer (Wm. S. Noyes), under the contract for the operation of Section 5, $42,822.40 but this is not urgent, as are the other debts. As mentioned in the report for 1913, I bought Section 5 to work in conjunction with the Presidio; it was offered to the Presidio Mining Company which was unable to buy it, and after that the contract to work it on shares was made."

The argument following (p. 219) solemnly asserts:

> "This solitary non-resident stockholder stood by, looked on, and did nothing effectual until he commenced this suit on July 26, 1915."

We find no complaint made that since July, 1915, nothing effectual has been done, for the history of this litigation shows such an upheaval that there is still gradually coming to light the history of devious practices not only since 1913, but for many years prior thereto.

Pages 221 to 228 of the brief are consumed with the statement that the company had Section 5 offered to it, but could not purchase. Noyes claims that it was offered to Mrs. Willis and Osborn; their answers were colored by the resultant attitude of mind of said parties influenced by the actions of Wm. S. Noyes.

The expenses (pp. 228-230 brief) were no mere trifles, and we shall touch upon this element of the case further on in our argument.

At pages 230 to 244 it is asserted the corporation was financially unable to acquire Section 5. We have already touched upon this matter, and will develop our answer to said statements more fully hereafter.

Pages 244 to 281 deal with the assertion that the complainants failed to establish that Section 5 was purchased with funds derived from the Presidio Mining Company. We answer said contentions fully in the subsequent pages of our brief, but desire to call attention to one or two misleading assertions. This portion of the transaction is not an isolated event, but was all a part of the general scheme of fraud conceived in sin and perpetrated in iniquity. Much emphasis is placed upon the fact

that the notes were paid in 1913, but it will be shown that they were paid by renewals and by other borrowings, which renewals and subsequent notes were not paid until long after Noyes had secured the funds from the corporation to enable him so to do. On page 50 it is asserted that there is no evidence of the payments to the Noyes note accounts; but there are vouchers showing the payments and cash book entries relating to the moneys drawn by Noyes from the company; and it likewise is a fact that in December, 1912, Noyes had no funds of his own, and 1382 shares. In 1914, however, the records show he loaned the company $10,000. When a man with no means at the commencement of a series of operations such as here revealed suddenly appears in affluent circumstances within a very short period of time, and he has not shown any other source of revenue, such as Noyes did not show, it will be presumed that his sudden accretions of wealth, such as are divulged in this case are a part of the general scheme of fraud, and the possessor of such sudden affluence will be held to account.

See U. S. v. Carter, 217 U. S. 301.

It is argued in the brief, p. 281, that at the time of the acquisition of Section 5 the Presidio Mining Company had no right, title, interest, estate, or expectancy in that section. The answer to this assertion is that it was acquired by the confidential agent under a liberal salary, who betrayed and used his knowledge of the property gained through the company service; he concealed the real facts from

the corporation, his principal, and manipulated affairs within the body corporate so that he dominated the principal stockholders and controlled them, arranged a biddable board of directors who reflected his views and whose complexion was that of his own personality; he took the expenses required in purchasing the property and the sustaining means and credit of the corporation to back his own plans and support his own program, and derived the very funds with which he in effect paid for the property through the manipulations originated, planned, and carried out by himself. The control of the corporation through the Osborn shortage, was the vehicle used through which the property was acquired; then its affairs were so manipulated that all its available funds flowed into the pockets of Noyes, and the company stockholders obtained nothing. Under the plans he had developed, with the pernicious November 19, 1913, contract, he has piled up a huge claim against the company. Then it is asserted (pp. 295, 296) that Section 8 had in no way been impaired by the purchase of Section 5 by Noyes, but that the result of the transaction as a whole has been favorable to the Presidio Mining Company. The logic of the brief fails.

Immediately following, however, on page 296, it is admitted in the argument that the facts and circumstances should be regarded cumulatively; that the evidence should be considered not by fragments, but in its entirety and as a whole,—in which state-

ment we concur as a rule of law, but not in the sense in which it is attempted to be used in the brief.

It is next argued (p. 297) that no trust can be impressed on Section 5 because of the proximity of that section to the company property. In this portion of the argument emphasis is again laid upon the pretended fact that the company was hopelessly involved and rapidly drifting into bankruptcy. In the amended and supplemental complaints the averments are that Wm. S. Noyes as the sole confidential agent of the company alone knowing the facts, wrongfully took advantage of what he knew, and the question of proximity of the property becomes material only in so far as it was known to be advantageous provided the high grade ores in it could be used to sweeten up the large reserves of low grade ores in Section 8 (Gleim test. 569, 572).

On the question of resulting trust (p. 300): We never have asserted any resulting trust, neither has there been any change of front by complainants, as asserted on page 303 of said brief. The inability of defendants to interpret the original and amended bills of complaint in any other way than as asserting a resulting trust does not help the situation, for we apprehend that the complaints set forth the facts. Our theory may be deduced from the pleadings both the amended and the supplemental bill, and from them with the answers the issues before the court were made. We have heretofore adverted to this subject in our general answer to the brief.

The assertion on page 306 that there was no constructive trust as to Section 5 we believe is answered by the evidence in the case and the finding of the lower court on said subject.

We have analyzed the brief of appellants on this subject because the question of Section 5 acquisition by Wm. S. Noyes becomes a very vital factor in this case. It is one of the principal elements involved in this chain of fraud.

We now present affirmatively a connected story showing the actual facts in logical order, disclosing the grounds on which may be predicated and premised true deductions, and to which the rules of law we shall announce are applicable. The application of said rules decisively supports the decision of the trial court and the position of the complainants in this suit.

Wm. S. Noyes has been connected with the company since its incorporation. He had sole and exclusive charge of the company's mining operations in Texas since 1883 (Par. 22 of answer, 202). He lived at the mine up to 1901, then in Oakland since, but controlled all operations of the company subsequent to his removal from Shafter. In November, 1912, he had been superintendent 29 years. He was the only person thoroughly familiar with Sections 5 and 8. In November, 1912, E. M. Gleim, the direct agent of Noyes in Shafter operating the mine, wrote Wm. S. Noyes that Section 5 was for sale (565, 682). At that time E. M. Gleim was thoroughly familiar with recent developments in Section 5 by engineers

exploring and developing it (565). Noyes immediately went to Oregon to negotiate a loan of $10,000 from Benton Bowers to assist in the purchase of Section 5. He returned the early part of December, 1912. On December 12, 1912, L. Osborn, the largest stockholder, transferred to Wm. S. Noyes 28,607 shares of his stock. On December 16, 1912, Wm. S. Noyes went to Marfa, Texas. Gleim met Noyes at Marfa. Noyes immediately arranged for a loan of $10,000 from the Marfa National Bank. Noyes and Gleim travelled around the country and secured options on all but 4 shares of the stock of the Silver Hill Mill & Mining Company, then owning Section 5. Harry Young, half owner, optioned his stock to Noyes for $10,000. Wm. S. Noyes and E. M. Gleim then went to the mine, 45 miles distant from Marfa. Upon arrival at the mine Noyes and Gleim together went into Section 5 and examined the ore bodies (686). They ascertained that there were from 10,000 to 20,000 tons available in the new body alone uncovered by the Lewisohn engineers. Assays made showed values of 45 ounces of silver to the ton. The ore body was estimated to be worth from $100,000 to $400,000 (568). Noyes testified that from his experience the mine always produced two or more times as much ore as could be measured (662). After ascertaining the values in Section 5, arrangements were made to take up options and extract ores. Noyes secured the loans for which he had previously arranged, to wit, $10,000 from Benton Bowers in Ashland, Oregon, one of the company's largest contractors whose contracts had been

awarded him by Wm. S. Noyes; $10,000 from the Marfa National Bank, secured by the Presidio Mining Company stock Noyes had taken from Osborn in December, this loan also superinduced by the transfer of the company's bank account from the San Antonio Bank to said Marfa Bank, with a business amounting to at least $250,000 per annum (Comp. Ex. 19, p. 6); and the $5,000 note to Harry Young, the Shafter storekeeper, whose prosperity would be assured by the favors of Wm. S. Noyes as agent of the company. Meanwhile, J. W. Kniffin, a milling engineer, had been sent for to design the cyanide plant. He arrived at Shafter on December 24, 1912. Kniffin was instructed to prepare plans for the cyanide installation. He finished his plans in the early part of January, 1913. On the 19th of January, 1913, Noyes claims he discovered the Osborn shortage (685). Kniffin testified he was informed by Gleim the early part of January that Osborn was short in his accounts, and to hold off on the cyanide installation until financial matters were readjusted (949). On the 19th Kniffin was instructed to commence work; on the 20th work began. The same day Noyes and Gleim went to El Paso to buy machinery (958). On the 23d Noyes wrote the Willis letter (537, 540).

During this period the testimony of both Noyes and Gleim evidences an understanding that was evidently had and given to others, that this Section 5 was to be obtained for the corporation. (W. S. Noyes' answer, 213, 215); the Willis letter (537-

540); test. W. S. Noyes (724, 683, 765) that he had offered the property to the corporation. E. M. Gleim testified that during the time when they were securing options and examining Section 5 he told Noyes: "We ought to get the property" (565).

When questioned as to whom he meant, he said:

> "Mr. Noyes and myself, as representatives of the Presidio Mining Company" (565).

He testified also:

> "We went to the bank" and the cashier "told us we could get the money" (566).
>
> "As soon as we found we could get control of the stock * * * we immediately went back to Shafter. We went into Section 5" (567).
>
> "It looked very favorable to us" (568).
>
> "It was high grade ore" (569).
>
> "That body of high grade ore we found would have been of no value by itself. Its main value lay in the fact that we could use it to grade up the low grade material, which we knew was standing in the mine" (569).
>
> "It had some high grade ore, which was something we had to have, having the low grade bodies we did have" (572).
>
> "It was very doubtful if there was enough ore in Section 5 to justify a metallurgical plant. *That is why the property was turned down by the people who had previously examined it"* (569).

Noyes claims that in February he offered Section 5 to the Presidio Mining Company, and that they refused it (765), admitting that his offer was a "colloquial" one, and not formally made to the directors.

Wm. S. Noyes testified (690):

> "The company could have that mine at cost if they wanted it. By that mine I refer to Section 5."
>
> "That the company could take the mine any time they were able to off my hands at its cost, or if I had got to stand under all of this, I thought it was only fair that I should have some compensation for it."
>
> "It was rather a colloquial offer. They were simply told it was open to the company if they wanted to take it" (765).

But notice the evasion in the following:

> "The company took no action—that is to say, the company could not do it; it had no money. In November, the minutes recite that it had been offered to them; it was offered verbally at that meeting" (765).

Who controlled the actions of these directors, Osborn, Peat, Miss Doherty and B. S. Noyes? Were they independent free agents?

Miss Doherty testified:

> "He" (W. S. Noyes) "said whenever the company was able to take it for what he paid for it, why, the company could have it if they wanted to" (814).
>
> "Q. At any of the different meetings that you have testified to, was there anything said by William S. Noyes as to the terms upon which the Presidio Mining Company might obtain from him Section 5?
>
> A. I think he said, pay him what he had paid for it; they could buy it from him whenever they wanted it, or words to that effect" (817).

B. S. Noyes testified:

> "Mr. Noyes stated" (referring to February 15, 1913, meeting) "that the company could have Section 5 at cost then or thereafter, and it was informally decided prior to the date of that meeting that the company could not take it, and the suggestion had been made" (by whom?) "and assented to by all parties, that as long as Mr. Noyes carried it the company would work the ore and settle with him on a basis of one-half the net" (909).

The significance of the last quoted testimony clearly sets forth that so long as Mr. Noyes carried Section 5 the company would work the ore.

Under the November 19, 1913, contract provision was made for a method by which this company never could quite get enough money to buy the property, for Noyes would get it all,—and this result took place.

Captain Overton testified (586):

> "I tried to find out from Mr. Osborn how much Section 5 had been offered to the Presidio Mining Company for, and when. I told him I could find no records for that. He told me he did not know when the offer was made, or for how much, I would have to see Mr. Noyes about that."

> "Mr. Peat had conversation with me relative to these matters, and told me he did not know when Section 5 was offered to the Presidio Mining Company, nor for how much. I could not find out. I was trying to find out how much Section 5 had cost and could not find out from either Mr. Osborn or Mr. Peat. Mr. Osborn told me that there was no record of that unless it might be a memorandum in

> Mr. Noyes' own office. I looked over the records thoroughly; I did not find anything. I found nothing in the minutes at all, where it says, how much it was offered for, or where it was offered; it simply says in the minutes of November 19th, that it had been offered, but there is no record where this is found. I started to investigate both here and in Texas through friends to try to find out mainly how much Section 5 cost and what it sold for. I learned through a business relation that $25,000 was the price. I went practically through all the records of the company" (587).

We have here a conflict of testimony. Wm. S. Noyes, B. S. Noyes and Miss Doherty all say that Wm. S. Noyes offered the property to the company, to be taken by it at any time the company saw fit to do so, at its purchase price to him.

As to his offering the property to the company, two of the defendants, Peat and Osborn, stated to Captain Overton that they knew nothing about an offer to the company, or when it was offered, if at all.

We have already adverted to the fact that all payments and expenses in connection with these negotiations were paid by the corporation, covering those of Noyes and Gleim, the assaying and sampling, the sending of telegrams for which the company was never reimbursed by Noyes. Vouchers 14, 18 and 23 show company expenditures of $433.55 traveling expenses Noyes and Gleim incurred on account of cyanide plant and purchase of Section 5 (764). The assaying was done by paid employes of the Presidio Mining Co. Voucher 19

shows $22.05 spent for telegrams (764). The company never was reimbursed for any part of said sums. None of the letters or telegrams sent by Noyes from Texas to San Francisco can be found (766). All have been destroyed or removed (746, 649, 524).

The Silver Hill Mill & Mining Company had 1500 shares. The following is a tabulation showing the dates, parties, shares and amounts paid, aggregating $24,009.33 (508):

Date Paid		No. Shares	Amount
1913			
Jan. 25.	H. B. Young	750	$10,000.00
" "	Mrs. Colquitt	281	3,746.66
" "	W. H. Colquitt	90	1,200.00
" "	T. C. Crosson	93	1,240.00
" 31.	J. C. Midkiff	30	400.00
Mar. 7.	W. S. Lane	252	4,300.00
Apr. 1.	H. M. Daugherty	4	175.00
		1500	$21,061.66
Paid Frank Russell March 20th "for services in negotiating deal"			500.00
Extra payments as per stipulation (693, 683)			2,447.67
Total for Section			$24,009.33

This amount of $24,009.33 was all borrowed money, of which not a dollar was repaid until he had drawn a greater sum from the company, as follows:

Ref.	Entry	Amount
684 903 532	Aug. 19, 1913. Made first payment to Marfa Bank by borrowing from B. S. Noyes. Before this date Noyes had received on account Section 5	$18,076.10
684 532	Oct. 1, 1913. Paid Bowers $10,000 and interest of $584.15. This is the first actual money he paid out. By this date Noyes had received an additional $6958; $3000 of which he took out this very day, making	25,034.10
684-685 532 533	Nov. 26, 1913. Noyes paid Harry Young $5000 by again borrowing from Benton Bowers. By this date he had received	26,503.60
685	Sep. 25, 1915. Noyes paid Bowers money borrowed Nov. 26, 1913 ($5,000). This is the second time he actually paid out money. By this date he had received	57,129.60
684 685 903	Oct. 4, 1915.* Paid second loan from Marfa Bank. This is the third time he paid out money	
685	Nov. 16, 1915. Paid renewals of loan from B. S. Noyes. The day before this payment (Nov. 15, 1915), he received an additional $3650, making a total he had received in cash before paying $24,009.33 for Sec. 5,	60,779.60
524	Dec. 1, 1915. Received $2556.60 Total	63,336.20

* This date is given in Noyes' testimony as October 4, no year, but it must mean 1915, as is shown by the statement of Noyes that in March, 1915, he still had $15,000 of loans out, helping to carry Section 5 (728).

The foregoing synopsis and reference to the pages of the record evidences the history of the financial transactions occurring during the period subsequent to the obtaining of title to Section 5 by Wm. S. Noyes on May 26, 1913. The amounts of money received by Wm. S. Noyes are all entered in the cash books of the company which were admitted in evidence in the case during the trial. Should any question be raised by appellants about the amounts of payments to Wm. S. Noyes, we respectfully urge that the original books of record introduced in evidence be submitted to the court to verify the various payments made to Noyes. The record shows that with two claimed exceptions all the moneys paid by Wm. S. Noyes for Section 5 were secured by him through promissory notes given to interested parties who were beneficiaries under his program. The only two claimed exceptions are the payments alleged to have been made from moneys received from New York City through Herzog & Glazier, and a sister of Wm. S. Noyes. The payment made to Bowers October 1, 1913, it is asserted was partially made up with $6000 drawn from Herzog & Glazier, New York, through J. Barth & Co. in San Francisco (685). Noyes testified that this account with Herzog & Glazier was held sometimes in cash and sometimes in stocks, the results of speculation. That he should have $6000 to draw on is no indication that he did not deposit there in New York some of the very moneys paid him from the company here. He was speculating, and therefore

moneys were moving in and out of this account. From this liquid account in New York he drew $6000 to pay part of his note to Benton Bowers, the balance coming from his bank account here. This very day Noyes drew from the treasury $3000, making a claimed total of $25,034.10 drawn by him to that date, of which $11,000 was used to get control of the company. This total of $25,034.10 is subject, however, to the deduction on September 6th of $3500 which he falsely testified he had received knowing at the time that the receipt evidencing said transaction was a fictitious document.

Concerning the second item, as to the property his sister had sold for him, nothing was said as to the amount received through the transaction, and nothing was introduced in the way of documentary proof by Noyes in support of his statements. Other than these two amounts, which are both uncertain, the one being uncertain as to the source of the money not coming from the Presidio Mining Company, and the other not being shown, the entire amounts requisite to pay for Section 5 were secured by him on promissory notes given to interested parties, the times of payment being extended by borrowing from one to pay another, and ultimately paid after Noyes, a man without ready money of his own in December, 1912, was able to draw the total sum of approximately $60,779.60, less the sum of $3500, a net amount of $57,279.60, from the Presidio Mining Company, the alleged tottering and bankrupt concern "steeped in impecuniosity to the very lips" (appellants' brief, p. 302).

Appellants' brief touching the foregoing matters urges most insistently that we must trace the trust funds from the corporation into the pockets of Wm. S. Noyes, and through the pockets of Noyes into the hands of each one of these different parties who received moneys on Section 5 purchase account, and that unless this be done complainants' case must fail. We do not so construe the law. In addition, they seek to construe in connection with this line of argument and logic that the "whole contention" of complainants is alleged to be that Section 5 was bought with borrowed money, and that the notes given to purchase the same were not paid for a year or a year and a half thereafter. Can it be said under the circumstances, considering all the facts in the case, that a reasonable deduction can be made from the statement so often quoted in appellants' brief, that the "whole contention" with regard to the acquisition of Section 5 was to the manner of its purchase, when the evidence clearly shows that the remark was made during the trial when only the purchase price was under discussion?

We have clearly shown that Wm. S. Noyes, B. S. Noyes, and Miss Doherty testified that Section 5 had been offered to the company to be acquired by it whenever it desired it or could take it from Wm. S. Noyes at the price paid by him. Why arrange matters through his company control so that it could never take it off his hands?

The burden of proof as to the fairness of the transactions surrounding Section 5, its acquisition by Noyes, and the subsequent management of the company, is to be considered in the light of the circumstances and facts existing in the case, and under the rule the burden is upon Wm. S. Noyes, and all doubts must be resolved against him. He was the confidential agent of the company in a fiduciary relation.

Equity does nothing by halves, but administers complete justice when wrong has been done, and under this rule full restitution is required by Wm. S. Noyes, not only by turning over the property to the corporation on payment of its purchase price, but by accounting for all the proceeds derived therefrom under the different contracts made by him.

The trial court in touching on this same matter expressed itself thus (oral opinion, 419):

> "The main matter for consideration in the case—the acquision in the name of William S. Noyes of Section 5— was enabled to be had by virtue of his getting control of the company and its board of directors; and I find that while the transaction was not carried out in that form it was nevertheless an acquisition of that property by funds of this company in fact; that Noyes alone, aside from his superintendent Gleim, was, of all the people connected with the company, fully cognizant of the character of Section 5 and its value; that while he manipulated the securing of the control of that section and its eventual transfer to his name by means which might upon their face bear the impress of having been procured by funds other than those of the company, nevertheless he knew at the

> time that he had potential control of this company and that he could procure the means or funds from the company with which to pay for this land; and that he pursued a course which brought that result about. The incidental transaction referred to as the bonus resolution was with that object in view; first, to secure the means by which to manipulate the control of the Osborne stock, and, second, the passing of that resolution also brought about a situation which enabled him to secure the funds of the company; that and the subsequent leasing of Section 5 to the corporation defendant enabled him to procure the means with which to pay every cent of the consideration paid for Section 5.
>
> Under these circumstances, I am satisfied that equity, which looks to the substance and ignores the mere form in which a transaction is cast, will hold that property to be in equity the property of the Presidio Mining Company."

The oral opinion (422) also designated the bonus resolution as being as bald a fraud as had ever fallen under the observation of the court, and held:

> "the finding being that the title to this Section 5 should really be in this corporation, all the benefits that accrued to Mr. William S. Noyes from that transaction, as well as the subsequent lease which I hold likewise to be void, must be accounted for."

Summing up the evidence touching on the acquisition of Section 5, we believe it is clear from the evidence that the following is fairly deducible:

1. Wm. S. Noyes was the confidential agent of the company, on whom all depended for information at all times during the inception of his plan for and carrying out of the acquisition of Section

5 by himself, together with the subsequent conduct and management of said property.

2. Wm. S. Noyes' credit on which he secured the money to purchase Section 5 was made available through the company backing due to his position with the corporation.

3. The money used in purchasing said property came from interested parties who were the company's beneficiaries:

(a) Benton Bowers, the contractor hauling freight and furnishing wood to the company;

(b) The Marfa National Bank, which benefitted by the change in the bank account, its $10,000 loan to Noyes being secured by Presidio Mining Company stock and the endorsement of William Cleveland, its director, anxious to get business for the bank;

(c) Harry Young, the Shafter storekeeper, who would participate in the continued prosperity of the company.

4. Wm. S. Noyes had no ready money of his own in December, 1912, and but 1382 shares of the capital stock of the company.

5. Wm. S. Noyes alone knew the possibilities both of Section 5 and Section 8. He had operated both sections.

6. He obtained Section 5 ostensibly for the company, as he himself, his brother, and Miss

Doherty testified; that the company could have said section at any time it wanted the property on paying its original purchase price to him. The testimony of Gleim shows how necessary it was for the purpose of using the rich ores in said section to sweeten up the lower grade ores from Section 8.

7. He knew he could not work the property himself, but the company could. That in order to control the means he must control the primary source of the means, viz., the Presidio Mining Company.

8. He knew a long life was ahead of the company if it acquired Section 5; that the ores were very necessary to the property in continuing said long life.

9. The Presidio Mining Company paid all his own and Gleim's expenses while securing the options on the stock, while acquiring the same and closing the deal, even to the telegrams concerning the acquisition of said Section 5.

10. The Presidio Mining Company paid the salaries of all the men actually employed, for assaying, sampling, investigating and reporting on the property.

11. The company paid all the bills for equipment of Section 5, including the tramway installed to facilitate its extraction of ores.

12. The moneys of the corporation were ultimately used to repay the very notes given by Wm. S. Noyes.

13. Wm. S. Noyes never obligated himself to pay any of the corporation bills incurred through these transactions nor the improvements made to the company's property, to facilitate said extraction of ores.

14. All information Osborn or Mrs. Willis had in the premises was what Wm. S. Noyes desired they should have. The actions of both Osborn and Mrs. Willis were the reflected desires of Wm. S. Noyes.

15. The price of silver in November and December, 1912, was higher than for many years.

16. No large stockholder other than these two, Osborn and Mrs. Willis, were approached on the subject, but active concealment took the place of that frankness and openness required under the law touching these transactions.

17. He manipulated the entire transactions through the Osborn control, gained through the knowledge of Osborn's shortage, and playing upon Mrs. Willis' mind, then planned the lease for 50 cents per ton royalty, the bonus resolution for $45,000 for getting the same, $11,000 "forthwith" used to conceal the Osborn shortage, and then intended to be left free to garner all the gains by means of the pernicious contract of November 19, 1913, which provides for the false assaying system and the dollar differential.

18. From a man with no ready money in December, 1912, he was able with the corporate resources,

to appropriate to himself all its assets to secure the funds to repay his notes, and emerge with every corporate asset in his hands, plant, equipment, credit, and finally its entire surplus cash, all of which was a part of his scheme to enrich himself, to the loss and detriment of the company.

19. The burden of proof is on Noyes to show the fairness of all these transactions.

The law applicable is stated in Angle v. Chicago etc. Ry. Co., 151 U. S. 26, as follows:

> "If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, *but in any other unconscientious* manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner."

The rule is likewise discussed in

Steinbeck v. Bon Homme M. Co., 152 Fed. Rep. 338;

Trice v. Comstock, 121 Fed. 622;

Pomeroy's Eq. Jurisprudence, 3rd Ed., Vol. 3, Sec. 1053;

39 Cyc., pp. 27, 182.

See also authorities on burden of proof, pages 66-70, brief.

The rule concerning the principles of law applicable to Wm. S. Noyes under these conditions is

fully expressed by Mr. Mechem in his work on Agency, Vol. 1, 2nd ed. 1914:

"Sec. 1188. Loyalty to his trust is the first duty which the agent owes to his principal. Without it, the perfect relation cannot exist. Reliance upon the agent's integrity, fidelity and capacity is the moving consideration in the creation of all agencies; in some it is so much the inspiring spirit, that the law looks with jealous eyes upon the manner of their execution, and condemns, not only as invalid as to the principal, but as repugnant to the public policy, everything which tends to destroy that reliance.

Sec. 1189. It follows as a necessary conclusion from the principle last stated, that the agent must not put himself into such relations that his own interests or the interests of others whom he also represents become antagonistic to those of his principal. Indeed, this rule is but a re-statement of the previous one, and is based upon the same fundamental principles. The agent will not be permitted to serve two masters, without the intelligent consent of both. As is said by a learned judge: 'So careful is the law in guarding against the abuse of fiduciary relations, that it will not permit an agent to act for himself and his principal in the same transaction, as to buy of himself, as agent, the property of his principal, or the like. All such transactions are void, as it respects the principal, unless ratified by him with a full knowledge of all the circumstances. To repudiate them, he need not show himself damnified. Whether he has been or not is immaterial. Actual injury is not the principle the law proceeds on in holding such transactions void. *Fidelity in the agent* is what is aimed at, and as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his

> own private interest to disregard that of his principal.' 'This doctrine', to speak again in the beautiful language of another, 'has its foundation, not so much in the commission of actual fraud, as in that profound knowledge of the human heart which dictated that hallowed petition "Lead us not into temptation but deliver us from evil", and that caused the announcement of the infallible truth that "A man cannot serve two masters" '."

We deal further with the fiduciary relations existing between Wm. S. Noyes and this corporation under the title of Agency on page 205 of this brief.

(b) Acquisition of Osborn Stock and Control of Presidio Mining Company.

In December, 1912, two persons owned the controlling majority stock of Presidio Mining Company, to wit, L. Osborn, 59,554 5/6 shares, India Scott Willis, 36,956 2/3 shares (standing in the name of Miss L. M. Doherty); total 96,511½ shares out of a total of 150,000 shares, all issued and outstanding. Wm. S. Noyes had only 1382 shares. The change in the stock holdings of these parties began December 12, 1912, after the receipt of the Gleim letter by Noyes informing him that Section 5 could be purchased. After the return trip from Oregon and the arrangement for the $10,000 loan from Bowers, 28,607 shares were transferred from Osborn to Wm. S. Noyes four days before the latter went to Texas. On splitting the Osborn stock in

December the certificates evidencing said shares were as follows:

No. 81, 28,606 1/3 shares, L. Osborn

No. 82, 28,607 shares, Wm. S. Noyes.

January 9, 1913 (506), these two certificates were cancelled and new certificates issued, three to Osborn for 10,000, 5000, and 13,606 ⅓ shares respectively, and three to Wm. S. Noyes for 10,000, 5000 and 13,607 shares respectively. These last transfers were made while Wm. S. Noyes was in Texas, and were handled by B. S. Noyes, the brother, who was about to become President of the company (577). This all took place before January 19th, the date of the alleged discovery of the Osborn shortage by Noyes. Relative to the ownership of said stock, on December 25, 1907, Osborn wrote Wm. S. Noyes as follows:

> "Now, Noyes, perhaps I did not make myself plain in my letter to you of the 14th inst. that I really own over 50,000 shares of the capital stock of the Presidio Mining Company which Mr. and Mrs. Boyd sold to me at a mere nominal figure, with the understanding that if you wanted one-half of said shares which I now own you can have them. So I wish you would please let me know at your earliest convenience if you will join me in taking this stock or not, as in case you decide not to take it I will endeavor to find some other purchaser" (655).

To this letter there is no reply. There is no evidence showing that Noyes ever bought said stock. There is no documentary proof adduced by the defendants showing the ownership or transfer to Noyes of said stock. Whenever he desired to sup-

port his own contentions during the trial of this suit he had voluminous data, figures, documents, cancelled notes and vouchers, showing his attention to details. On this particular point he has nothing. The fact is, he never was the owner of one-half of Osborn's stock. Only after the complainants late in 1915 discovered the facts relative to the Osborn shortage do the defendants shift their defense in this connection. After this discovery Noyes claims the ownership of the 28,607 shares since 1907. Prior to December 16, 1915 defendants all admitted and alleged that Osborn was the owner of the entire 59,554 5/6 shares up to December, 1912. Their averments follow:

> "* * * defendant admits that thereafter, and on or about December 12th, 1912, the defendant L. Osborn, then secretary and *principal stockholder,* of said corporation, from his stock holdings therein, then and there transferred to this defendant 28,607 shares of his stock" (answer, W. S. Noyes to original bill, 337).

> "That the annual meeting of stockholders for the years 1908, 1909, 1910 and 1911 were attended by only stockholders L. M. Doherty (36,956 2/3 shares), L. Osborn (57,223 1/3 shares), L. Osborn, Trustee (2,331½ shares), Wm. S. Noyes (1,382 shares)," etc. (idem. 337, 338).

> "That in the year 1912 this defendant had acquired an additional 28,607 shares of the capital stock of said Presidio Mining Company" (idem. 338).
>
> (See also (208, 209) answer of W. S. Noyes to amended bill of complaint.)

"* * * defendants admit that thereafter, and on or about December 12, 1912, the defendant L. Osborn, then secretary and *principal stockholder* of said corporation, from his stockholdings therein, then and there transferred to the defendant, Wm. S. Noyes, 28,607 shares of his stock" (answer, L. Osborn and B. S. Noyes to original bill, 338).

"That in the year 1912 said defendant Wm. S. Noyes had acquired an additional 28.607 shares of the capital stock of said Presidio Mining Company" (idem, 338).

In the answer to complainants' amended bill of complaint Wm. S. Noyes repeats these same statements, and so likewise does L. Osborn (209, 338, 339).

In W. S. Noyes' answer to amended bill appears the following:

"Defendant admits that on or about December 12th, 1912, L. Osborn the then *largest individual stockholder* of said corporation transferred to this defendant 28,607 shares of his stock, but this defendant denies that said transfer was made for the purposes mentioned in said bill of complaint, or that this defendant *obtained said stock from L. Osborn* as a part of or pursuant to the conspiracies set forth in said bill of complaint, or any conspiracy, or for the purposes mentioned in said bill of complaint" (166, 338).

(See same allegation (99), answer of L. Osborn and other defendants to amended bill of complaint.)

Counsel's explanation of transfer follows (Vol. II, pp. 341-345):

"The Court. What is your theory as to the manner in which William S. Noyes acquired this stock of Osborn, for what consideration?

Mr. Harding. The consideration was this, that Mr. Boyd and Mrs. Boyd, away back in 1907, had transferred that stock to Mr. Osborn for a nominal consideration, and with the understanding that Mr. Osborn should turn one-half of that stock over to Mr. Noyes at any time that he wanted it.

The Court. For nothing?

Mr. Harding. For payment of the consideration—half of the consideration which Osborn paid for it.

The Court. What was that?

Mr. Harding. That was merely a nominal consideration.

The Court. Why did Noyes permit this stock to remain with Osborn, then, throughout seven or eight years?

Mr. Harding. In the language of his own testimony, when I asked him that question on the stand he said, 'I was keeping off the books like all of the other large stockholders.'

The Court. I do not remember that. They did not keep off the books. Boyd was on the books.

Mr. Harding. No; from 1907, your Honor, Mr. Boyd kept off the books. From 1907, outside of Osborn, there was not a single stockholder of any large holdings that had the stock in his own name.

The Court. Do you mean by that to infer that Boyd's transfer of stock to Osborn was not a bona fide transfer?

Mr. Harding. That was bona fide.

The Court. That is not keeping off the books; it is a disposition of the stock.

Mr. Harding. It is a disposition of the stock, but the letter from Osborn shows he simply gave it to Osborn for a nominal consideration because he considered the corporation was a

bankrupt corporation, was on its last legs. He did not want any liability coming from a stockholders' liability later. Mr. Noyes was ordered at that time to shut the mine down, and when we look at the record, at section 8, for instance, and see the condition of the ore returns, it is very evident that the ore had gone down away below operating cost, and Boyd and his wife got out; Mrs. Willis shortly thereafter transferred her stock into the name of Miss Doherty. The records show that in this case, there was not any large stockholder of the former large stockholders that cared to hold stock in their own name. Here was stock presented, so to speak, to Mr. Noyes by Mr. Boyd. He simply let it stand where Mr. Boyd had put it, and there is nothing in the record anywhere to show that the testimony of Mr. Noyes is not absolutely true in that regard; it is substantiated by the letter of Mr. Osborn that that stock was given to him or transferred to him for a nominal consideration, but holding one-half of it for Mr. Noyes. There is absolutely nothing in the record anywhere except the statement——

The COURT. Have you got that letter there, the letter of Osborn to Noyes?

Mr. HARDING. Yes, I have it here.

The COURT. I have forgotten its tenor.

Mr. HARDING. Here is the important extract from that letter, which was dated the latter part of December, 1907: 'Now, Noyes, perhaps I did not make myself quite plain in my letter to you of the 14th instant, that I really own over 50,000 shares of the capital stock of the Presidio Mining Co., which Mr. and Mrs. Boyd sold to me at a mere nominal figure, with the understanding that if you wanted one-half of said shares, which I now own, you can have them. So I wish you would please let me know at your earliest convenience if you will join me in taking this stock or not, as in case you decide not to take it, I will endeavor to find some other purchaser.'

The Court. That looks like a purchase; that does not sound like a gift.

Mr. Harding. You mean from Boyd?

The Court. To Osborn, and that Osborn expected to have Noyes pay his proportion of the expense of the purchase.

Mr. Harding. At a mere nominal consideration. However, it was the equivalent of a gift.

The Court. There was a tender to Noyes in 1907?

Mr. Harding. Yes.

The Court. Where was there any evidence that he ever elected to take advantage of that?

Mr. Harding. Noyes testified that when he saw Osborn the next time he told him he would take that stock.

The Court. Where is the evidence that he ever paid anything toward that stock. I want to be frank with you, Mr. Harding, because the evidence makes a bad impression upon my mind, as to the transfer of these big blocks of stock, and the subsequent conduct of the mine.

Mr. Harding. *But there is no evidence other than that.*

The Court. Mr. Harding, of course it is not alone to the positive statements of witnesses that we look in a case; it is the inferences that are to be drawn from all the circumstances under which things are done, just as potent, exactly, and usually more so, than the mere unsupported declarations of witnesses. I do not want to do anybody an injustice, but there are some things that must be cleared up in order to relieve my mind of the strong sentiment of wrong here."

Here was a direct challenge to the defendants to produce the testimony claimed by them to have been in their possession, as set forth in their motion to reopen said case (301). Instead of availing themselves of their opportunity to then and there ask

for the reopening of the case, in order to introduce the evidence which they claim to have been familiar with, they rested upon the proof then adduced and elected to take their chance on a decision with the facts claimed to have been well known to them at the time. We maintain such action is an acknowledgment of the lack of evidence to prove ownership in Wm. S. Noyes of any of the shares of stock of Osborn at any time prior to December, 1912. Had Noyes owned such a large stock interest he would have actively participated in the San Francisco management of the company. It is admitted that Osborn had embezzled $100 to $300 monthly for some years prior to January, 1913. Noyes would not have countenanced Osborn, known by him to have been short in his accounts before (539) to have run the company with four dummy directors. In his affidavit of December 16, 1915, Wm. S. Noyes averred as follows (340):

> "In this connection affiant further says, that for more than six years prior to February, 1913, the affairs of said corporation had been conducted by the said Osborn, as secretary and director in conjunction with four dummy directors, of whom Chas. H. Fish was succeeded by B. S. Noyes on said board, and of whom F. H. Gardiner and E. A. Herger were succeeded on said board by this affiant and the said L. M. Doherty."

The foregoing refutes the assertions to the contrary in appellants' brief (page 146).

No court would allow a claim by Noyes against Osborn's estate in the event of Osborn's death.

Had Noyes died, the family of Wm. S. Noyes could have sustained no claim against Osborn for said stock under all these facts.

Osborn was fearful of a disclosure of his crime. The 28,607 shares were taken from him by Noyes before leaving for Texas. After his return the 30,-937 5/6 remaining shares were taken from him by the Noyes brothers, 25,011 shares by Wm. S. Noyes and 5,926 5/6 shares by B. S. Noyes. Osborn then retained 10 shares to qualify as a director. There was no vacillation by Noyes. He says he had ascertained the cash on hand from Osborn before going to Texas. If so, why was it necessary for him to wire to B. S. Noyes in January as a "measure of extreme caution"? Why necessary to destroy these telegrams? Section 5 was then under Wm. S. Noyes' control. Noyes demanded that he, his brother, Mrs. Willis, or Miss Doherty representing her, go on the board. Concerning the orders sent by Noyes he testified (688):

> "I drew up the lease. As soon as it was executed, I sent it up to my brother, and told him to tell the company to execute it, and to put discussion of the matter over until I got up."

This lease of January 25, 1913, for 50 cents per ton royalty was in effect a direct contract between the corporation and Noyes. It had been sent by Wm. S. Noyes to his brother in San Francisco, with orders to have Osborn call the directors together and adopt the same (688). The written evidence of the transactions on the company's

minutes (473, 477) pertaining to the meeting of January 29 had by these respective defendants are false in stating:

(a) Fish's place was declared vacant;

(b) B. S. Noyes was elected director;

(c) Peat resigned as president;

(d) B. S. Noyes was elected president;

(e) Peat was elected assistant secretary.

Fish was present at the meeting, as Gardiner and Herger testified (444, 446, 454, 455). The lease was adopted and the $15,000 loan authorized, but no information was given of Noyes' ownership of the Silver Hill stock, and nothing was said as to the Osborn shortage. B. S. Noyes prepared the minutes of this meeting on January 28th and on the assumption that Fish would be absent. He was present. The minutes however, were written up as prepared irrespective of this fact (577).

After this meeting of January 29, 1913, Gardiner and Herger resigned by request. The Fish stock was cancelled and the shares issued to B. S. Noyes. On January 31st, the date of the Gardiner and Herger resignations, W. S. Noyes and L. M. Doherty were elected directors and the new board was then composed of Wm. S. Noyes, vice president and general manager, controlling, B. S. Noyes, L. M. Doherty, Osborn the thief, and Peat the former dummy president. These defendants continued Osborn in office at a salary of $300 per month. B. S. Noyes was elected president and paid $150 a month salary to watch Osborn (249). Peat as

former president had received $25 a month; he now had the position of assistant secretary created for him, with the same salary. Wm. S. Noyes' salary was $450 per month, the same as theretofore, but from this time on was charged to the corporation in San Francisco, whereas theretofore and always up to this time it had been charged in Texas as a part of the general operating costs of the company.

The first meeting of this new board was held February 15, 1913. Two things happened, first the bonus resolution of $45,000 was adopted, $11,000 payable forthwith to Wm. S. Noyes. Second, Noyes was given full power to hire and discharge any employe of the corporation, including his superintendent. With his biddable board in San Francisco, and power to hire and discharge company operatives, Noyes' power has been ultimate and absolute from that day to this.

On said date the bonus resolution was adopted, Wm. S. Noyes explaining it (750, 759). How did Wm. S. Noyes involve his estate for $24,000 when this bonus resolution provided for the unconditional payment to him of $45,000? Appellants insist that because of the Osborn shortage the company could not pay $24,000 for Section 5, yet the company could and did obligate itself to pay $45,000 as a bonus for obtaining one year's lease on said section.

The bonus resolution indicates fraud. It was prepared by the attorney, B. S. Noyes, submitted to his brother, Wm. S. Noyes and approved by him;

it states that the company will pay $45,000 *from its own treasury,* and not from Section 5 profits. It further says that Wm. S. Noyes had expended large sums of money in securing said lease, which is incorrect. He paid nothing. The vouchers show expenses paid by Presidio Mining Company for Section 5 account (521, 522). The company paid for all assaying (568); also $22.05 for telegrams (522); all these telegrams and all correspondence covering this period are destroyed (649, 746). Yet on any point desired by Mr. Noyes he has most voluminous and minute data carefully segregated, analyzed and collated through past years.

February 21, 1913, Osborn executed a promissory note for $10,689.75 to Wm. S. Noyes, giving as collateral 25,000 shares of his stock, with full power to sell the same publicly or privately, with or without notice, on default. Osborn has paid nothing on said note. Wm. S. Noyes testified that the "$11,000 forthwith" was advanced to him to conceal the Osborn shortage (753). This $11,000 was split in two payments, $6,000 February 24th and $5000 February 28th.

This sum of "$11,000 forthwith" was actually handled in the following manner: On February 24th a check for $6000 was drawn in favor of Wm. S. Noyes, signed by B. S. Noyes and L. Osborn (526). Noyes deposited this sum in his account in the Anglo & London Paris National Bank, and on February 25th drew his check for $5000 in favor of L. Osborn (576); Osborn cashed this check and on

the same day (February 25th), deposited the money to the credit of the Presidio Mining Company (588), but no corresponding entry in the books of the corporation was made. Three days later, on February 28th, the company drew another check in favor of Wm. S. Noyes, this time for $5000, which check was also deposited in Noyes' bank, and on March 1st Noyes gave Osborn a check for $5689.75. The same day Osborn cashed this check and deposited the money to the credit of the Presidio Mining Company, again making no entry of this deposit.

In this way, the original $6000 had been made to do duty twice. It went out the front door of the corporation quite boldly, and then slipped in the back door without even ringing the bell. By making two such round trips, $6000 had been made to cover up a shortage of $10,689.75.

A receipt for $11,000 was placed in the company files by Wm. S. Noyes. The shortage was thus concealed. What should have been done was to have a tabulation made of the amount due on the shortage of Osborn and a charge on the company's books made against him, and payments made thereon to the extent of said indebtedness. There would have then been a proper entry on the books of the corporation and no concealment. In the shuffle 25,000 shares of the Osborn stock remained with Wm. S. Noyes, plus $310.25. The moneys thus taken from the treasury were illegally taken. The funds passed through Noyes' hands back again into the company treasury, pursuant to a conspiracy on the

part of the defendant directors. This did not repay Osborn's obligation to the company. He still owes the company $10,689.75, besides other shortages discovered later.

Wm. S. Noyes then controlled the Silver Hill Mill & Mining Company, the corporation owning Section 5. He was the dominant power in the affairs of the Presidio Mining Company in San Francisco by reason of his control over Osborn and the dependence placed in him by Mrs. Willis, superinduced by the $18,000 yearly dividends as a bait. This bonus providing $45,000 for obtaining a lease on property costing $24,009.33, said property being taken over with the promissory notes given first, for $10,000 to the bank secured by collateral taken from Osborn in December, 1912; second, for $10,000 to Bowers, the contractor who held his position by sufferance and authority of Noyes; and third, $5,000 to Harry Young, a storekeeper in Shafter who likewise could only participate in company business with Noyes' consent, clearly indicates a most glaring fraud and abuse of a fiduciary relation on the part of Wm. S. Noyes, which was never acquiesced in by the minority interests of this company, and the real transactions were never known to them.

On March 12, 1913, B. S. Noyes received 2,320½ shares of the Osborn stock, and W. S. Noyes the remaining 11 shares, all for no consideration. The original 59,554 5/6 shares by this date had been split as follows (506):

Dec. 12, 1912 To W. S. Noyes outright	28,607	
Mch. 12, 1913 To W. S. Noyes outright	11	
Feb. 12, 1913 To W. S. Noyes as collateral	25,000	53,618
Feb. 21, 1913 To B. S. Noyes outright	3,606 1/3	
Mch. 12, 1913 To B. S. Noyes outright	2,320 1/2	5,926 5/6
Total Osborn stock to Noyes Bros.		59,544 5/6
Feb. 21, 1913 Willis stock to B. S. Noyes		5,000
Remaining Willis stock		31,956 2/3
W. S. Noyes prior to Dec. 12, 1912		1,382
		97,883 1/2

Miss Doherty testified she placed her holdings in the voting trust to give Noyes control (507). This voting trust was to continue for five years. The above tabulation discloses that in December, 1912, Wm. S. Noyes had 1382 shares. Through the Osborn shortage he was able to strip Osborn of his entire holdings, leaving but 10 shares. If Osborn objected, he could be branded a felon. Noyes allowed Osborn to continue as director and secretary at $300 a month. Mrs. Willis consented to these transactions; likewise Miss Doherty, who represented her. The inducements held out to these

two last named in the Willis letter were about $15,-000 per year dividends if the cyanide plant were installed, even after the 5000 shares of the Willis stock had been transferred to B. S. Noyes. Had this representation been fulfilled, the 10,000 shares transferred to B. S. Noyes would yield him $5000 a year for his part in the transactions. His work comprised about two months, San Francisco manipulations interlocking with those of his brother in Texas. The defendants participating in these transactions never paid a dollar for the stock acquired by them. The complainants in this suit represent a family investment of about $60,000 in cash (579).

B. S. Noyes testified he was the "errand boy" for his brother. Peat testified he did as he was told by the Noyes brothers. He admitted he did not tell the truth to Overton (893). Miss Doherty followed the Noyes' suggestions. Osborn was powerless, Wm. S. Noyes directing his acts in January, 1913. This indicates every move was carefully planned concerning the various transactions we have outlined. Since January 31, 1913, this board has acted as the nominees of Wm. S. Noyes. He in effect has been the corporation. All are in *pari delicto*. The monthly salaries have been: $450 to Wm. S. Noyes, $150 to B. S. Noyes, $300 to L. Osborn, $25 to John W. F. Peat, Wm. S. Noyes raised Gleim's salary in January, 1913, from $250 to $350. In August he raised Gleim's salary to $450, contrary to the by-laws of the corporation (511, 756) (appendix 28). Since September 23, 1915, when Osborn was deposed, Peat

has been secretary with a salary of $270, part of which continually found its way into the Osborn family, according to an affidavit made by Peat and filed in the trial court. Mr. Klink testified that $75 a month is sufficient pay for keeping the company books in San Francisco (1015).

This combination by the majority stockholders to carry out a predetermined plan constitutes such majority the actual, if not technical, trustees for the company's minority stockholders. The devolution of power imposes correlative duty.

> Jones v. Missouri-Edison Elec. Co., 144 Fed. 771;
>
> Miner v. Belle Isle Ice Co., 17 L. R. A. 418;
>
> Meeker v. Winthrop Iron Co., 17 Fed. 48.

Wm. S. Noyes comes within the purview of the rule, that one in control of a majority of the stock and of the board of directors of a corporation occupies the relation of a fiduciary towards the minority stockholders. Every act in his own interest to the detriment of said minority becomes a breach of duty and trust.

> Hyams v. Calumet & Hecla Min. Co., 221 Fed. 537;
>
> Jones v. Missouri-Edison Elec. Co., 144 Fed. 771;
>
> Wheeler v. Abilene Nat'l. Bank. Bldg. Co., 159 Fed. 391.

The facts heretofore stated constitute actual fraud.

> Jackson v. Ludeling, 21 Wallace 616;
>
> Wheeler v. Abilene etc. Co., 159 Fed. 391;

Jones v. Missouri-Edison Elec. Co., 144 Fed. 765;

Barker v. Montana etc. Co., 35 Mont. 351; 89 Pac. 66;

Miner v. Belle Isle Ice Co., 17 L. R. A. 412;

Cited in Cowell v. McMillin, 177 Fed. 43.

(c) Management of Presidio Mining Company after January 1913.

The board of directors after January 31, 1913, was comprised of the defendants in this case, of which Wm. S. Noyes was the dominant control. Each defendant participated with him in all the manipulations of the company affairs, the resolutions, acts and proceedings as shown by the minute book of the company.

Under the pan amalgamation method the cost of treatment, including San Francisco salaries, was $9.51 per ton. Since the cyanide installation operating costs have been about cut in half. Nevertheless, Noyes figured Section 8 as losing money continuously since said installation (appendix 31). Mr. Klink testified that in 1911 and 1912 the company cleared $32,000. In November, 1912, the company lost $6173.05. In December, 1912, the company cleared $6946.71. In January, 1913, the books show a loss of $2377.96. This month expenses began to pile up because of arrangements to operate Section 5. From November, 1912, to April, 1913, inclusive, under the old pan amalgamation method the profits were $23,-379.33 (1073). This sum was nearly sufficient to pay for Section 5, had the company been allowed to

do so. If it was a good purchase for Noyes, it was a good purchase for the company. By active concealment of the facts from the corporation stockholders, and by the transactions as carried out he actually prevented the corporation from securing the property or evidencing any desire to do so. It would have been just as easy to have acquired the loans for the corporation and paid the money from the earnings during the above period as to pay the money to himself from the corporate treasury, for the corporation assets were behind the deal. During 1913 he drew moneys from three sources:

1st, up to October 30, 1913, he had drawn $2003.60 pursuant to the terms of the January 25th lease providing for 50 cents per ton royalty;

2nd, up to October 30, 1913, he claimed to have drawn $24,500 under the terms of the bonus resolution. This sum should have been $21,000 because of the concealment of the $3500 item in September, 1913, making the total sum of $23,003.60 received by Noyes. He had in addition manipulated the $3500 in further concealments of Osborn shortages;

3rd, subsequent to November 19, 1913, he drew during the remainder of the year approximately $3000 more under the provisions of the contract of said date.

The actual condition of the company for several years prior to 1913 was as follows (993):

Date	Cash, Drafts, &c.	Supplies	Liabilities	Total
Aug. 31, 1908	$39,498.95	$21,390.69	$737.50	$60,152.14
Aug. 31, 1909	28,515.66	22,772.05	None	51,287.71

Date	Cash, Drafts, &c.	Supplies	Liabilities	Total
Aug. 31, 1910	18,924.82	19,104.33	None	38,029.15
Aug. 31, 1911	28,262.59	25,335.54	None	53,598.13
Aug. 31, 1912	31,724.27	21,737.05	None	53,461.32

In November, 1912, Noyes suddenly decided a cyanide plant was a necessity. This was the month Gleim reported to him the opportunity to purchase Section 5. A month earlier Noyes had reported to the stockholders that the company had netted $17,-510.14 in the preceding twelve months; that a new oil burning engine had been installed which would effect a large economy in operating expenses, and that "the company's plant is now in most excellent condition."

Appellants base their defense largely on what they claim to be the perilous financial condition of the company "during the crucial period immediately preceding and following January, 1913" (appellants' brief page 89). This period is variously alluded to as one of "impecuniosity", "impoverished coffers", "tottering on the verge of bankruptcy", etc. Appellants claim the company was rescued from ruin by Wm. S. Noyes—even going so far as to call him its "savior" (appellants' brief 162)—alleging that the pan amalgamation plant could no longer work the ores at a profit. Did Wm. S. Noyes buy Section 5 for himself to save the company, and then have the company install a cyanide plant on its own credit to work *his* ores for an alleged half the net, thus completing the salvation?

The alleged good condition in August, 1916, is presented to this court (appellants' brief 93) to prove how effectively he saved the company, and on pages 89 and 90 certain figures purporting to show the "crucial" condition in 1912-13. In both instances figures were altered by *suppression* and *substitution.* On page 89 appellants have suppressed assets entered in the Klink Bean schedule 15, and have inserted an item "Net $7823.50", manufactured by the appellants *through said suppression.*

Klink Bean schedule 15 (1008) does not show "Net $7823.50" on November 30, 1912, but does show a "Net Worth" on said date of $41,265.40.

Likewise instead of the "Net $13,438.02 Dec. 31, 1912" (appellants' brief 89) said schedule shows a "Net Worth $48,212.11"; instead of the "Net $11,021.17 Jan. 31, 1913", a "Net Worth $45,834.15" on said date; instead of "Net $15,259.35 Feb. 28, 1913", a "Net Worth $54,848.07"—this last figure is complicated (col. 4) by "Mining Lease $45,000" entered as an asset, and "Resolution $34,000" entered as a liability.

It is proven by appellants' own figures that the so-called "crucial period", extending over the six months from November, 1912, to April, 1913, inclusive, all under the pan-amalgamation plant, were exceedingly prosperous. Defendants' Exhibit .... (1073) shows the gain and loss month by month for this period, as follows:

Nov. 1912	Loss	$ 6173.05	Col. 2
Dec. 1912	Gain	6946.71	" 3
Jan. 1913	Loss	2377.96	" 4
Feb. 1913	Gain	9013.92	" 5
Mar. 1913	Gain	3097.14	" 6
Apr. 1913	Gain	12872.57	" 7

Net profit for the six months, $23,379.33 (col. 1). This is at the rate of over $46,000 a year, or more than 30% earnings to the stockholders.

We append schedule 15 in full in the appendix to this brief because of its importance, since appellants have laid such stress on the loss of $2377.96 in January and the overdraft of $3303.72 in December, 1912.

Defendants' own figures prove that Section 5 could have been bought and paid for from the operating profit made under the pan amalgamation method during the six months of the "crucial" period. Further had Osborn's peculations of over $15,000 been made good, the company could have bought Section 5 from its earnings and had over $14,000 left in the treasury. And on October 7, 1912, Wm. S. Noyes reported to the stockholders that "the company's plant is now in most excellent condition."

Compare this situation with that of August 28, 1916, after the appellants had been in control of the company for over three years. On page 93 appellants' brief, they have arranged a table which is manufactured from the testimony *in part* of B. S. Noyes August 28, 1916 (1057). Appellants de-

sire to prove the company prosperous on this date, so this time they have as carefully suppressed *Liabilities* of August 28, 1916, as they did *Assets* of the "crucial period" 1913, from Klink Bean schedule 15.

"Net Worth" means what is left over after outstanding liabilities are paid (Sch. 15). Instead of the "$85,576.44" represented as the condition of the company August 28, 1916, we have a *deficit* of practically $15,000 on that day, as sworn to by B. S. Noyes (1057-1058):

> "The total of these liquid assets is $85,576.44, against which 28/31 of August expense has run; it is an undetermined amount; but figuring from the usual operating expense, that would amount to $22,600; hence we have a surplus in cash, bullion and supplies of $62,976.44 approximately; no bills whatever due, no obligations, save what may be found due to Mr. W. S. Noyes" (1058).

This changes the $85,576.44 presented in appellants' brief (93) to $62,976.44, without subtracting "what may be found due to Mr. W. S. Noyes".

On cross-examination (1060) B. S. Noyes admitted that on July 1, 1916, Wm. S. Noyes' claim

> "would be, I should say, $69,000 to $70,000".*

In the same paragraph, B. S. Noyes admits:

> "It comes pretty close to $4000" (a month) "for those particular six months" (1060).

* Note.—The amounts in the transcript as prepared by appellants are in numerals, and all amounts in this cross-examination are in numerals, except the $69,000 to $70,000, which is written out fully and therefore difficult to follow in reading without close scrutiny (1060).

Hence Noyes' claim on August 28, 1916, would be approximately $78,000, against B. S. Noyes' alleged assets of $62,976.44, which proves a *deficit* of over $15,000 on said date.

Thus, the net worth of $48,212.11 December 31, 1912, (1008) which included cash, bullion, supplies, bills payable and receivable and all liabilities, has dwindled to a deficit of $15,000 August 28, 1916, as testified to by B. S. Noyes on said day.

In addition, from 1913 to that date Section 8 had used up over 60,000 tons of its ore (996, 998, 1000), a very different story from what appellants' brief states.

Klink Bean's schedule 1 shows that each of the three years prior to 1913 ended with a substantial amount of cash on hand in the company's treasury, as follows (993):

August, 1910	Cash	$19,824.82
" 1911	"	28,262.59
" 1912	"	29,454.27

Thus, at the end of the fiscal year 1912, which appellants designate as being on the verge of bankruptcy, the company had the very substantial sum of nearly $30,000 cash in the treasury.

Contrast with this the history of the three years following (993):

August, 1913	Cash	$ 9,136.56
December, 1914	"	17,512.82
December, 1915	"	4,247.26

The above shows that in December, 1915, when the injunction was granted preventing the defend-

ants from drawing moneys, the company's treasury was practically empty.

Therefore, appellants' own figures prove that the company was prosperous in the crucial period, and, after three years of their management, was bankrupt August 28, 1916. It was not the installation of the cyanide plant which proved such a heavy drain on the corporation, but the installation of the "live" board of directors, dominated and controlled by Wm. S. Noyes.

The results during the years succeeding 1912 prove he controlled the corporation for his own personal ends. He used the company's plant solely for his own profit. The corporation has utterly failed of its purpose, because of the dominant power represented by Wm. S. Noyes, exercised with the connivance and consent of his biddable board. The Klink Bean schedules show that immediately on his securing control, Section 8 ore values were forced down and Section 5 tonnage forced up. A comparison follows:

	Section 8.	Section 5.		
1913 Tonnage produced...	14,722	6,848	tons	(996)
1914 " " ...	23,594.5	17,093.9	"	(998)
1915 " " ...	23,430.3	30,806.8	"	(1000)
1913 Alleged gross value of ore......	$113,429.49	$127,197.62		(996)
1914 Alleged gross value of ore......	107,514.28	161,211.79		(998)
1915 Alleged gross value of ore......	99,954.74	214,546.69		(1000)

The result was that the Section 8 losses, plus the San Francisco salaries, absorbed the alleged half the net from Section 5. See B. S. Noyes' letter page 31 appendix this brief.

This result was obtained by the use of two methods: First, methods of assaying; second, the dollar differential.

1. The assays were taken by grab sample. The ore recovery from the mill was figured at 59% of the stope assays. The following shows the actual computations:

	Calculated Contents Stope Assays X Tonnage.	Actual Yield Ounces.	
1913	679,923.61	420,383.31	= 61.82 %
1914	1,188,394.17	524,863.66	= 44.165%
1915	1,696,237.44	656,091.52	= 38.67 %

Mr. Lasky, who was familiar with the system, testified that the manner of assaying was not susceptible of accuracy (930). Kniffin testified that a system of assaying and sampling which is from 48% to 76% of the actual recovery is very inaccurate (951). This assaying and sampling left all matters in the power of Wm. S. Noyes and his nominees, to produce any alleged assays he wanted. No assays were taken from the different working faces of the same stopes and tonnages kept of ores from said working faces. The following table illustrates this point:

Computation of Noyes' Alleged Profit by Nov. 19, 1913, Contract.

Take Stope 13 for example:

If ore is broken from two working faces each is assayed. If one face assayed 100 ounces and the other 10 ounces, the value of ore from that stope was taken as follows:

	100
	10
Divide by number of faces,	2/ 110
	55 ounces

This was used as the value of the commingled ore, regardless of the tonnage from each face.

If 4 tons were taken from the 100 oz. face and 1 ton from the 10 oz. face the value was:

	4 x 100 = 400 oz.
	1 x 10 = 10 "
Divide by number of tons,	5/ 410
	82 oz. per ton commingled ore

If reversed, viz: 1 ton from the 100 oz. face and 4 tons from the 10 oz. face, the value is:

	1 x 100 = 100 oz.
	4 x 10 = 40 "
Divide by number of tons,	5/ 140
	28 oz. per ton

Noyes took the average assay, 55 ounces, as the value of his 5 tons, as follows: 5 x 55 = 275 ounces, as the basis of his recovery.

This inaccurate method is provided for in the November 19, 1913, contract. The system is wrong. The bullion computations based thereon are likewise wrong. Noyes has received $59,836.20 in cash and claims the company owed him approximately $80,000 more at the time of the submission of the case, which it could not pay. The fictitious losses of Section 8 have more than absorbed the alleged half of the net from Section 5. Mr. Klink testified he would not purchase ores under the conditions obtaining (1010-1011).

2. The dollar differential provided by the November 19, 1913, contract is also inherently wrong. We present the following abstract example for the purpose of exhibiting the principle involved, as the actual figures of tonnage and values are complicated and confusing:

Assume 3000 tons of ore produced in any one month, 2000 from Section 8 and 1000 from Section 5. With an operating cost of $6.00 per ton, the 3000 tons would cost	$18,000
$1.00 per ton was arbitrarily deducted for the ores from Section 5, the 1000 tons, therefore, would be charged	5,000
Making the 2000 tons from Section 8 absorb the remaining	$13,000

or $6.50 a ton, a differential of $1.50 instead of $1.00.

Appellants' brief (p. 369) attempts to refute this example by showing that a certain part of the dif-

ferential is returned to the Presidio Mining Company in the division of the "larger net" (whatever that may be), and that this amount returned reduces the differential back to the $1.00 the contract appears to call for. In order to prove this theory, appellants have to drop their example in the middle, and leave the $1.00 which they have deducted from the alleged lesser operating expense of Section 5 to take care of itself by vanishing into thin air. Unfortunately, an expense of $1.00 per ton has to be taken care of in some definite account, which in this case is the expense account of Section 8. Therefore this $1000 deducted from the expenses of mining 1000 tons from Section 5 is added to the $12,000 expense of mining 2000 tons from Section 8, making $13,000 to be charged to the 2000 tons from Section 8, a cost of $6.50 per ton,—and we are back again to the differential of $1.50.

But our example is more favorable to appellants than the actual facts. During the year 1913, instead of the above 3000 tons of ore, 6848.2 tons were mined from Section 5 and 14,686.2 tons from Section 8, with a difference in cost between the two sections of $2.77 per ton in favor of Section 5 (1018), and in 1914 it was $1.66 per ton (1019), instead of the pretended $1.00.

Appellants submit the unique argument that because Wm. S. Noyes returned half the sum abstracted under this arrangement in the division of half the net to Section 8, that there was therefore

nothing wrong about it. In other words, if a man takes $100,000 and returns $50,000 of it to the owner, he is not guilty of theft,—it is fair and generous of him to return half the money,—he might have kept it all.

Appellants attempt to justify this $1.00 per ton reduction in cost of Section 5 ore by the testimony of Mr. Gleim, on an estimate of tonnage made by measuring the places where ore had been taken out three years before, and figuring the distance in tramming. This is an absurdity (1043-1054). Yet even with this strained effort, Mr. Gleim could only figure 88.9 cents in favor of Section 5 from Jan. 1, 1913, to Aug. 31, 1914.

We can estimate what Wm. S. Noyes obtained through the dollar differential, but how much he obtained through juggling the assays he alone knows. It is inconceivable that a man who would work out such a complicated and concealed system of mulcting the company as the dollar differential, would hesitate to take advantage of a method so ready to his hand and so absolutely untraceable as the erroneous assaying system used, which the witness Lasky, who is never mentioned in appellants' brief, testified, was not susceptible of any accuracy (929-946). All computations made on Section 5 bullion production as a basis of payments to Wm. S. Noyes were made by him without check of any kind. Appellants' brief, page 358, claims that Form 15 was attached to the computations, but Noyes' own testimony shows (700) that this Form

15 was never in the company office until demanded by Captain Overton.

Some claim is made that the purchase of Section 5 was a speculative and hazardous enterprise. If so, why pay $45,000 for a lease on the same? The bonus resolution says Noyes obtained the lease at the request of the corporation. The evidence shows he forced it upon the company. He never spent a dollar in securing the lease. The resolution says he spent large sums. Noyes claims the $45,000 bonus was intended to be half the net from Section 5. If so, the enterprise was not hazardous, because Noyes knew before February, 1913, that he could make $90,000 profit in six months. Again, if it be true that it was intended to be half the net, why draw $2003.60 from the company on the basis of 50 cents royalty up to the middle of October, 1913, and during the same period draw money under the terms of the so-called bonus resolution. The contract of November 19, 1913, is a vicious fraud on the minority stockholders. The original lease calls for a 30 days' notice of cancellation. Where is said notice? The resolution authorizing the contract of November 19th says that the January 25th lease is unfair to Noyes ;and he refuses to go on with it. Noyes admits he prepared this new contract (759).

The law will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity.

Wardell v. R. R. Co., 103 U. S. 658;

Meeker v. Winthrop Iron Co., 17 Fed. Rep. 48;

Wilbur v. Lynde, 49 Cal. 292;
Sims v. Petaluma Gas Light Co., 131 Cal. 659;
Wickersham v. Crittenden, 93 Cal. 29;
10 Cyc. 787, 807.

Directors of a company cannot exercise their powers for their own personal ends against the interests of the company.

Koehler v. Black River Falls Iron Co., 2 Black. 720, 721;
Jackson v. Ludeling, 21 Wall. 625, 631;
Ervin v. Oregon Ry. & Nav. Co., 27 Fed. Rep. 632, 635;
Wardell v. Railroad Co., 103 U. S. 651, 657, 658;
Davis v. Rock Creek L. F. & M. Co., 55 Cal. 364;
Oakland Bank of Savings v. Wilcox, 60 Cal. 141;
Graves v. Mono Lake Hydraulic Min. Co., 81 Cal. 303, 317, 319.

Persons combining to cheat and defraud another are all liable to the defrauded party.

Lomita Land & Water Co. v. Robinson, 154 Cal. 46;
Lincoln v. Chafflin, 7 Wall. 138.

It is not essential that the participants shared in the profits of the fraud.

Lomita Land & Water Co. v. Robinson, 154 Cal. 46;
Stony Creek Co. v. Smalley, 111 Mich. 321; 69 N. W. 722.

It is immaterial whether the nominees of a controlling stockholder know of the interest of said controlling stockholder or not.

Pacific Vinegar & Pickle Works v. Smith, 145 Cal. 352;

Munson v. Syracuse R. R. Co., 103 N. Y. 74; 8 N. E. 358.

See also:

United States v. Standard Oil of New Jersey, et al., 152 Fed. 294;

Wiborg v. U. S., 163 U. S. 658;

Moore v. Finger, 128 Cal. 319;

Maloy v. Berkins, 11 Mont. 138; 27 Pac. 444;

Dodge v. Goodell, 12 Atl. 238;

2 Pomeroy, Secs. 926-928.

At the annual meeting in October, 1913, the same defendants attempted to ratify their own acts as directors and officers by resolution (482, 483).

Attempted ratification of their illegal acts as directors, by the same persons constituting the majority stock, at a subsequent corporation stockholders' meeting, does not validate said acts.

Woodroof v. Howes, 88 Cal. 199;

Curtin v. Salmon River Hydraulic Gold Min. Co., 130 Cal. 351;

Camden Land Co. v. Lewis, 63 Atl. Rep. 533.

The burden of proof is on directors dealing with the corporation to show transactions to be fair and

honest, and said transactions will be subject to the closest scrutiny.

> Ross v. Quinnesec Iron Min. Co., 227 Fed. 343;
> Sage v. Culver (N. Y.), 41 N. E. 514;
> Miner v. Belle Isle Ice Co., 17 L. R. A. 417;
> Meeker v. Winthrop Iron Co., 17 Fed. 51.

(d) Secret Side Profits of Wm. S. Noyes.

Out of 471 pages of appellants' brief, we find only one page devoted to the defense of Wm. S. Noyes touching the subject matter of secret profits made by him in Texas covering a period of many years, and arising out of the relations of the Presidio Mining Company with third parties, directly and indirectly and concerning which information was elicited during the trial from Wm. S. Noyes himself.

On page 373 of appellants' brief the following statements are made:

> "The transactions are all fully explained in the testimony * * * they all ceased and determined long ago * * * the transactions themselves were perfectly open, wholly unconcealed, and frankly disclosed."

In his answer to the amended bill Noyes averred that he disposed of his business interests approximately three years ago (193).

In his testimony during the trial he first stated that his business interests ceased in the nineties (731); confronted with his answer he changed his testimony (773).

During all these years while connected with the corporation as the sole managing and confidential employe and agent, it appears that Wm. S. Noyes had received compensations from three now known sources:

1. From E. G. Gleim Company;
2. From Benton Bowers;
3. From James Mann.

E. G. Gleim, doing business as E. G. Gleim Company, for many years conducted a general merchandise store in Shafter, Texas. The company employes traded with said merchant, and at the end of the month the moneys payable to the merchant for goods purchased and accounts owing were turned over to him by the Presidio Mining Company in a lump sum, and deductions made by the corporation from the individual employe's wages. In connection with these matters E. G. Gleim paid Wm. S. Noyes monthly compensation (730-734; 773-786), which was a respectable sum, considering the trade of one to two hundred employes.

Benton Bowers, the company contractor hauling freight and selling wood to the company, likewise paid moneys monthly to Wm. S. Noyes, approximating $100 per month (928).

James Mann, a mine foreman in the employ of the corporation, operated a company boarding house in one of the company structures, and he too divided monthly with Wm. S. Noyes the profits made therefrom (773-4; 785).

It thus appears that Wm. S. Noyes, under a liberal and fair salary covering all these years, and as the confidential agent of the corporation, personally secretly profited in addition to his salary from these various sources. He received a salary of $450 a month, and approximately $100 a month and upwards from Benton Bowers, and also sums from the Gleim store, and drew moneys derived from profits made in feeding men employed by the corporation. We find no instance in any recorded case where a confidential agent of a corporation stopped to such profiteering.

Nowhere does Noyes explain, nowhere is it shown by Noyes or any of the defendants, that the corporation or any official or any stockholder ever knew or was informed of these secret side profits made by Noyes and defendants all denied knowledge of same (127, 128). The facts were only disclosed at the time of the hearing when pressure forced the exposure of the same.

The law dealing with such matters is clear. It is not necessary for the principal to be damnified. Fiduciary relations require a full disclosure to the principal, and unless such profits are fully disclosed and the principal consents to their retention, they must be repaid to the principal by an agent. The law touching these matters is fully covered under the title of Agency hereafter discussed in our brief. The trial court only did its duty under the facts disclosed in requiring an accounting as to this profiteering in order to ascertain

the exact amounts due from Wm. S. Noyes to the company.

3. WITNESSES.

(a) Attitude of defendants.

(b) Conflicting testimony.

(c) The $3500 transaction.

(a) Attitude of Defendants.

We advert to the attitude of defendants. In addition to the active concealments of records, falsification of company books, destruction of letters and documents elsewhere mentioned in this brief, appellants have continued to conceal information and destroy records. B. S. Noyes, president, on August 16, 1915, wrote to E. M. Gleim (916):

> "About one month ago, one W. S. Overton, a stockholder of this company, appeared in San Francisco and subsequently filed a complaint in the United States District Court for this District, against the company and its five directors, the said complaint being filed with malicious, false and slanderous statements, mostly made up out of whole cloth and with no foundation whatever in fact."

Further on in the same letter he informs Gleim that (917):

> "* * * it is the right of the stockholder to see the books of account, statements and *perhaps* official communications; he is not entitled to any clerical assistance, to any explanations or to have any employes of the corporation take pains to elucidate matters that he cannot work out for himself."

Again he says:

> "The foregoing is written to you with the idea that you will better know how to meet such a situation should any such arise hereafter."

On August 26, 1915, replying to Overton, he wrote (912):

> "* * * The apportionment of bullion yield about which you inquire, is almost entirely a matter of arithmetic and I informed you plainly that the tonnage and stope assays can be verified only by Mr. E. M. Gleim, the Superintendent."

In response to Overton's request for information relative to location of certain stopes, he says:

> "* * * those which lie within the boundary line of Section 5 belong to Section 5 and those within the boundary lines of Section 8 belong to Section 8."

His position relative to duplicate copies of the Internal Revenue Returns is shown as follows:

> "There are no retained returns of these statements and they are not required by law to be kept. As to asking for these from the Internal Revenue Service, I positively refuse to do so or to permit any employee of the company to do so for the following reasons: They are not required to kept by the company, they cannot be of any possible service in determining whether or not the affairs of the Presidio Mining Company have been honestly and efficiently managed, and there can be no reason for requesting them, save a desire to pester and annoy the officers and employees of the company."

His closing remarks are:

> "In this connection I have the honor to inform you that the law will not permit you to spend the remainder of your natural life in the office of the Presidio Mining Company and you are hereby notified to complete your investigations within a reasonable time and leave the officers and employes of the Presidio Mining Company free to attend to the daily business of the company."

In November, 1915, Gleim refused Overton access to the books at the mine on orders from B. S. Noyes (590).

The annual meeting is another illustration (591-594). The meeting was advertised to be held February 28, 1916. On the 26th an alleged defect in the amendment to the by-laws made in 1913 was seized upon, although the same majority held an annual meeting in February, 1915. Overton's request that such meeting be held and directed elected was refused, as was his request for a special meeting to be called at which all defects in this amendment could be cured by the joint vote of the majority and minority stock (771,772).

(b) Conflicting Evidence.

No attempt has been made by the appellants to impeach the testimony or the honesty or integrity of either or any one of the witnesses on behalf of complainants.

In the appellants' brief an attack is made upon the testimony of Kniffin, Gardiner and Herger. It is asserted that the witness Kniffin was an unre-

liable witness, uncertain and vague as to his dates and time and place of occurrences. A fair reading of Kniffin's testimony, commencing on page 948 of the transcript, discloses the facts, that Kniffin was a scientific and skilled milling engineer who designed the cyanide plant for which so much credit is assumed by appellants in their brief. His testimony as to his arrival at the mine and his instructions relative to designing and making the drawings and working plans is clear and convincing; also the dates when he completed the plans and was ready to proceed with the construction of the mill itself, when he was informed by Gleim in the early part of January of the shortage in the company's funds. The testimony of Overton shows that Kniffin was the man who communicated the fact of the Osborn shortage to him (616). It is also clear from Kniffin's testimony that Wm. S. Noyes was at the plant during all this period, which is corroborated by all the other testimony in the case. Kniffin must have been informed some time prior to the 19th of January, because he waited several days after knowledge of the shortages, and on the 19th was instructed to go to work, and on the 20th commenced the actual construction of the cyanide plant by putting in retaining walls. This was the day that Noyes and Gleim went to El Paso to purchase machinery. The conflict of testimony on this point between Wm. S. Noyes and Kniffin as to the date of discovery of shortage is only one of the factors involved fixing the time of knowl-

edge by Noyes. The burden of proof is upon Wm. S. Noyes under all the facts of the case, and the testimony of Noyes being shown to be unreliable and positively false in other respects, the presumption may be indulged in that it was likewise false in this respect, particularly in view of all the connecting facts and circumstances of the case. Gleim, who followed Kniffin as a witness, did not contradict the testimony, nor was any attempt made to impeach the testimony of Kniffin. Appellants seek to discredit Kniffin's testimony in order to bolster up the theory announced by Wm. S. Noyes that he discovered the shortage on the 19th of January. All the facts of the case point in the other direction, that the shortage was known to Noyes before he ever went to the mine in December, 1912.

B. H. Lasky, a mining engineer, graduate of Stanford University and an experienced man, who had kept books, done surveying and underground work at the mine, and was familiar with the premises, facts, circumstances and conditions, is not mentioned anywhere in appellants' brief. His testimony precedes that of Kniffin (929-947). Lasky explained in detail the assaying system, the inaccurate factors entering into the methods used, which prohibited correct and conclusive results, and permitted the manipulations by Wm. S. Noyes, shown elsewhere in our brief.

The attempt is likewise made to discredit the testimony of Gardiner and Herger, asserting that it was vague and uncertain. The motive for this

attempted construction of their testimony is likewise made to bolster up the position that the minutes of the meeting of January 29, 1913, were correct, when as a matter of fact they did not reflect the truth of the occurrences. It is also asserted in appellants' brief (322) that Captain Overton threatened Gardiner and Herger. A reading of their testimony discloses that Captain Overton did not threaten them, but called their attention to the contents of the minutes, which they at once asserted to be false; that the occurrences therein set forth never occurred (444, 453, 454). It will be recalled that B. S. Noyes prepared the minutes of this meeting the day before it occurred, and they were written just as he prepared them (577-578).

Likewise in the brief there is a transmutation of testimony of Mrs. Overton (424) to the effect that Captain Overton did not even know of his stock holdings. The record discloses by the testimony of both Captain Overton and Mrs. Overton that they were desirous of knowing how much stock the different members of their family owned (635). No attempt is made to impeach their testimony or discredit the same in the brief. No contradictions can be found, and no improper statements or falsities attributed to their testimony. Both were reliable, and showed fairness, openness and willingness to answer on any matters and without any attempted concealment.

Turning now to the principal witnesses on behalf of defendants:

Osborn, although subpoenaed by the complainants, failed to appear.

William Cleveland is a director of the Marfa National Bank. He was such in 1912. The bank obtained the company bank account, received the collateral stock of Noyes taken from Osborn in December. The company's deposits in said bank in 1915 were $269,750 (comp. ex. 19, p. 6).

Benton Bowers profits continuously from the company business. He is now contracting for the company, although living in Oregon. He split profits with Wm. S. Noyes for years.

E. M. Gleim, the superintendent, who was at all times under the control of Wm. S. Noyes. He had his pay raised by Noyes, in January, 1913, from $250 to $350 per month, and again in August, 1913, to $450 per month. This made the cost of superintendence $900 per month, salaries of E. M. Gleim and Wm. S. Noyes, to do work which Wm. S. Noyes formerly did alone when at the mine. Could the actions of a superintendent under Wm. S. Noyes' control be conducive to the interests of the minority stockholders, or those of Wm. S. Noyes?

Peat admitted he did not tell the truth to Captain Overton or Mrs. Overton. That he felt he did not have to do so (893). He likewise admitted being a dummy for years. Nevertheless he was paid a salary of $270 per month for services for which $75 was ample.

Miss Doherty represented Mrs. Willis. She admitted she knew nothing about the corporation

books nor the business of the company, and put the remaining 31,956-2/3 shares of stock into the voting trust to give Wm. S. Noyes control (819).

B. S. Noyes, who manipulated in San Francisco while his brother was manipulating in Texas; who received the telegrams and letters and replied thereto; who prepared the minutes of the January 29th meeting in advance; who directed Osborn to adopt the lease because his brother had ordered it; who prepared the bonus resolution which defendants now say has a different meaning from its plain import; who participated in the cutting up of the Osborn stock, and received 5000 shares from Mrs. Willis; who says he is his brother's errand boy; whose letters as president to the complainant Overton and to the superintendent at the mine show his disregard of the rights of minority stockholders; who participated actively in the concealment and withholding of records and suppression of evidence; who gave direct orders to the superintendent to refuse complainant Overton access to to the books in Texas; who personally profited by a salary of $1800 per year.

Wm. S. Noyes, whose designs and manipulations resulted in his domination of the entire board of this corporation. Who secured all of the Osborn stock for himself and brother, and by taking advantage of the reliance placed in him by Mrs. Willis, had her stock placed in his control by a voting trust to run for 5 years. Who absorbed the entire corporation contemporaneously with the ac-

quisition of Section 5, through the Osborn shortage, and all without the expenditure of any money of his own. Who has acquired this corporation, with no debts in 1912, and has manipulated so the books now show a heavy indebtedness to him. He has been connected with the company for over 30 years. He knew all the facts. He himself testified that his position did not change after he went on the board of directors, that it was a change in name only (652). He raised E. M. Gleim's salary to $350 per month, contrary to the by-laws before he was a director (p. 28 appendix this brief).

He denied the company spent any money on account of the purchase of Section 5 (184, 186); the records show it did. He denies the bonus resolution means what it says, although he was present and explained it when it was passed (750). This resolution says he had spent large sums of money in getting the lease, and would continue to render services in securing a continuation of the same, all of which is untrue. In November of the same year he cancelled the lease without 30 days' notice required (475). He says that the payments provided for in the bonus resolution intended to approximate and did approximate one-half the net profits from Section 5 (711, 179, 216, 217); then he must have been sure before February 15, 1913 that the total net would be $90,000 by August 15, 1913. He contradicts this by claiming that when he bought it he did not know the value of Section 5 (183, 214). At one time he says it

was a hazardous and speculative enterprise; then that it was good for $90,000 profit in six months. He claimed that he loaned Osborn $10,689.75 from his own funds (753); yet when pinned down he admitted the "$11,000 forthwith" was voted for that very purpose (753). His lease of November 19, 1913, says Section 5 was to be worked with no investment of capital by the Presidio Mining Company (492). He admitted that the Presidio Mining Company under his management did spend its own capital for development work of Section 5 (193, 194, 762, 763). He says he had to buy Section 5 in December without adequately or at all examining the same (213, 214); yet his testimony shows he made a careful examination, including assays of stope 13, all of which was paid for by the company (686, 687, 764). He says the purchase of Section 5 was refused by the directors in December, 1912 (214). These were Gardiner, Herger, Fish, Osborn and Peat. Gardiner and Herger say it was not offered. Osborn and Peat told Capt. Overton they did not know when it was offered (586, 587). Gardiner and Herger knew nothing about the ownership of Section 5, nor of the Osborn shortage, until called to their attention by complainant Overton in October, 1915 (444, 454). He also avers that while he did not offer Section 5 between January 25th and November 19th, 1913, he did offer it prior to January 25, 1913 (178). He testified later that he did not offer it to directors, but "colloquially" to Osborn and Mrs. Willis (both

under his control) after his return from Texas in February, 1913 (692, 765). He stated he was so familiar with Section 8 that he could live in San Francisco and superintend operations in Texas by occasional visits, and be worth $450 a month to this company (203); he says he operated as superintendent Section 5 for years (182, 212); that Section 5 was similar in character to Section 8 (212); he then attempted to prove the purchase of Section 5 hazardous because he did not know its geology (182). He claimed his connections with "business" interests in Shafter ceased in the nineties (731); when confronted with his own answer (773) he admitted he was wrong. He received a commission from the E. G. Gleim Company for collecting miners' store bills (730, 734). He testified the only mercantile establishment he was interested in was the Benton Bowers business (773); when finally pinned down, he admitted receiving moneys from the mine boarding house (773, 774). He admitted that in March he informed the Overtons he was sorry he had bought Section 5; that he had purchased the same for sentimental reasons (728); the records show that on that date he claimed to have drawn $36,414.00. He claimed it was his practice to destroy letters, even on company business (783, 784); yet when occasion arose during his testimony he produced voluminous data worked out to the minutest detail and carefully collated over years of time.

(c) The $3500 Transaction.

In the trial court defendants admitted concealing the Osborn shortage of $10,689.75 by not entering the deposit of $5000 February 25, 1913, and of $5689.75 March 1, 1913. They admitted this only when forced to do so after complainants' discovery of this embezzled sum; indeed, complainants accused all defendants excepting Peat of participating in the benefit of the bonus, but defendants made vehement denials of this, and averred in unequivocal terms that they not only had never done so, each for himself, but each averred that Wm. S. Noyes was the sole beneficiary therefrom. Wm. S. Noyes himself positively averred he alone received all of the benefits of the bonus.

It was essential to the defense to pretend that Wm. S. Noyes discovered the Osborn peculations after December, 1912, when he acquired the 28,607 shares of Osborn's stock; it explains why defendants have been so insistent in averring and so emphatic in their testimony during the trial, in attempting to conceal the fact that they not only had full knowledge of additional Osborn peculations, but that they had themselves actively concealed them on September 6, 1913, by making or permitting to be made false entries in each and all of the money books of the company (376, 377, 395, 396, 399, 400, 401, 402).

Acknowledgement of the falsity of these entries is made in Reply of Defendants to Complainants' Answer to their objections to the appointment of a

receiver, sworn to by B. S. Noyes on February 11, 1918, as follows (414, 415):

> "That early in September, 1913, John W. F. Peat called the attention of defendants Wm. S. Noyes and B. S. Noyes to the fact that the cash book of the Presidio Mining Company contained duplications of salary paid to L. Osborn and other matters chargeable to said Osborn, and, thereupon, said Wm. S. Noyes and B. S. Noyes sent for the said Osborn and the fact was developed that the further sum of $3385 appeared to be properly chargeable to said Osborn and the said Osborn was then and there informed that said sum must be forthwith made good to said company, and that Wm. S. Noyes would lend the said Osborn the money wherewith to make said sum good, but that it would be just as well to assume an even $3500 in order to be sure that said company received all its dues.
>
> That on or about the 6th day of September, 1913, said Wm. S. Noyes delivered to said Osborn a receipt acknowledging the payment by Presidio Mining Company to Wm. S. Noyes of the sum of $3500 for ore delivered from said Section 5 and told the said Osborn to account for the receipt of said $3500 by the company in some proper manner upon the books. That thereupon, the said Osborn made the entry in the cash book of the receipt of $3500 from "Sundry Receipts", as set forth and shown on Exhibit 9, attached to said affidavit. That said entry was not a false entry, but truly set forth the fact that the company had received $3500. That in posting the said item to the ledger, the said Osborn, whether by accident or otherwise, erroneously posted the same to an account in the ledger entitled "Sale of Quicksilver, Supplies, etc.", instead of to the account of "Profit and Loss", where said items should have been properly posted. That thereafter and having appar-

ently discovered said error in posting, the said Osborn made the journal entry set forth in Exhibit 10 attached to said affidavit, wherein and whereby the erroneous ledger credit above referred to was neutralized by a debit entry in the ledger to that account of sale of quicksilver, etc., and Profit and Loss was credited with the sum of $3500. That none of said entries are false or fraudulent, but were properly made, and the effect of said transaction and of said entries was to restore to the said company said sum of $3500 and fully and completely make up and restore said shortage. That one of the functions of a journal is to correct errors which are inevitable in every business, and the journal entry above referred to was proper and correct."

B. S. Noyes testified in the trial court (378, 405):

> "Of that $11,000 was gone—to be exact, $10,-689.75",

and further testified as follows (406, 378):

> "Q. You have kept several sets of books and do keep books at the present time?
> A. I either keep them or they are kept under my direction. I have in the past kept books.
> Q. You yourself have checked the books of the Presidio Mining Company since the time you became president?
> A. And from before that time—all of the existing books, I have checked them with my own hands.
> Q. What can you state as to the condition of those books from such an examination?
> A. They are correct and in balance."

This testimony was given during the trial of the case in March, 1916, and the reply of defendants to complainants' answer to their objections to the

appointment of a receiver, quoted above, shows that, despite his testimony that the books were correct and in balance, and that the Osborn shortage was $10,689.75, he at the time he was testifying knew that on September 6, 1913, nearly three years before, he assisted in the covering up of $3385.00 shortage. These admissions of B. S. Noyes were forced from him by developments after the trial of the case, and are in answer to an affidavit of W. S. Overton re answer to defendants' objection to appointment of receiver, dated January 31, 1918 (373-406).

Following a letter from Klink, Bean & Company concerning certain irregularities appearing upon the company's books (379, 380) Captain Overton on September 26, 1916, wrote a letter to the directors of Presidio Mining Company, as follows (381):

> "It is admitted that Osborn made away with $10,689.75. That has no connection with this $1800.00. My investigation has found false addition, and it looks to me very much as if someone had made away with the $1800.00 in question. That is the reason I request the company have Klink, Bean & Company continue the investigation, because as a stockholder I wish to know if this $1800 was stolen from the company, and if so, who did it and by what means it was concealed. I shall raise this point at the annual meeting of the stockholders on October 2nd."

A purported explanation of this $1800 item was made in a signed statement to the stockholders of the Presidio Mining Company, as follows (382-384):

> "Therefore, it appears to be the fact that $1800 has been abstracted by means of overpayments to the draft account and an attempt made to cover it up by means of the journal entry referred to by Klink, Bean and Company. The $1800 has not been posted to the credit of draft accounts, but $900 has been interpolated in pencil on ledger, page 35, and $900 more added to the credit footing on ledger page 86.
>
> An effort should be made to recover this money, but it is evident from the books that the matter was long ago outlawed and occurred before any of the present board became a director of the company.
>
> Yours truly,
>
> B. S. Noyes,
> Wm. S. Noyes,
> J. W. F. Peat,
> Directors."

This $1800 was part of the admitted $3385 embezzlements covered up by defendants September 6, 1913, by means of the $3500 entry. Hence the statement that

> "An effort should be made to recover this money",

is an attempt to deceive the stockholders. Only when forced to do so by the Klink, Bean investigations have defendants made this damaging admission.

The Klink, Bean report dated January 22, 1917, states (387-390):

> "Cash Book entry September 30, 1913...$3500.00
> (On this date there was apparently received the sum of $3500, but as there is no corresponding deposit in the bank it was not in actual cash.

Under date of September 6th, a disbursement to W. S. Noyes is entered of $3500, but for which no check was drawn against the bank account. It is manifest that these are offsetting entries, the result of which is finally a charge to Mining Lease Account, but without an actual cash disbursement.) * * *"

Page 393 of Transcript shows the following receipt:

"San Francisco, Sept. 6, 1913.

Presidio Mining Co. to Wm. S. Noyes, Dr. Received from Presidio Mining Co. Thirty-five Hundred Dollars on account of lease of Section 5 per contract $3500.00

Paid.

Wm. S. Noyes."

This false receipt runs through the books as follows (376):

Cash Book # 1, p. 100. Sept. 30, 1913,
Sundry Receipts received this day........ $3500 (396)
(Refers to p. 133 Ledger.)

Journal # 1, p. 107. Oct. 6, 1913, Sale of Quicksilver, Sundries, etc. To Profit & Loss........ 3500 (399)
(Refers to p. 133 Ledger)
(" " p. 50 ")

Ledger # 1, p. 133. Sale of Quicksilver, Sundries, etc., Account, Sep. 30, 1913. By Cash........ 3500 (400)

Ledger # 1, p. 50. Profit & Loss Acct. Oct. 6, 1913. Sundries, Sales, etc........ 3500 (401)

Cash Book # 2, p. 3. Sept. 6th, 1913.
By Mining Lease. Wm. S. Noyes, on acct. of contract for lease of Section 5, Block 8 H. & T. Ry. Survey Presidio Co., Texas.. 3500 (395)

Wm. S. Noyes before the trial court March 22, 1916, testified that he had received since January 31, 1913, to December 31, 1915, $63,000 plus in cash, in addition to his salary from said corporation (377). This said $3500 so receipted for is included in said sum, and was known by him at the time of his testimony to be untrue. Noyes' motive in concealing this material matter was to conceal the further shortages of Osborn. Had he told the truth either as a witness or in his pleadings, the trial court would have learned of the other embezzlements of Osborn, so well known to Noyes and the other defendants, and by concerted action concealed from the court in their answers, and by Wm. S. Noyes and B. S. Noyes by their testimony.

The averments of all the defendants are likewise emphatic that not one of them participated in the bonus except Wm. S. Noyes. Complainants accused the defendants with having participated in the bonus, and defendants B. S. Noyes, L. Osborn, John W. F. Peat in their answer of October 11, 1915 (122, 123), denied that any of them

> "received a portion of the sums paid to Wm. S. Noyes under the provisions of said resolution, but aver that all of said payments were made to Wm. S. Noyes individually, for his own benefit. * * * These defendants, each

> for himself avers, that they are not interested in Section 5, either directly or indirectly, and that they have not been paid or have received any of the profits thereof paid by said Presidio Mining Company to the said Wm. S. Noyes."

Wm. S. Noyes' answer of the same date, viz., October 11, 1915 (188, 189), likewise denies that any of the defendants other than himself

> "received a portion of the sums paid to him under the provisions of said resolution, but avers that all of said payments were made to him individually, for his own benefit."

The Klink, Bean audit above referred to shows that Wm. S. Noyes not only did not receive for his own sole benefit the $3500, but did not receive it at all.

Wm. S. Noyes also, in answer to Supplemental bill, dated March 16, 1916, admits (247, 248):

> "that under said resolution, in the month of February, 1913, there was paid to this defendant from the company's treasury the sum of $11,000 in two checks; one on February 24th for $6000, and one on February 28th for $5000. Admits that he deposited said sums of money to his own credit and that he then and there drew his own personal checks covering the amount of the shortage denominated the "Osborn shortage" of $10,689.75, which said checks were cashed by L. Osborn, who, in company with and under the eye of B. S. Noyes, the brother of this defendant, then redeposited said money to the credit of the Presidio Mining Company. Admits that no entry of the redepositing of said money to the credit of the Presidio

> Mining Company was made in the books of the corporation."

B. S. Noyes, L. M. Doherty, John W. F. Peat and L. Osborn (269) make this same admission in almost identical words. That all knew of these transactions is proved by further averments of each of these defendants (248, 270) as follows:

> "admit that all of the directors of said Presidio Mining Company, to wit: John W. F. Peat, L. Osborn, B. S. Noyes, L. M. Doherty and W. S. Noyes, knew of said acts and never objected to the same, but allowed the said moneys of the said corporation to be used as herein set forth."

Wm. S. Noyes admitted under cross-examination at the trial (753):

> "The company paid me $11,000 from its treasury under the so-called bonus resolution, so as to enable me to make good this shortage to the company."

The averments of none of these defendants regarding the Osborn shortage reflected the truth in stating positively that no one of the defendants participated in any of the bonus; the testimony of B. S. Noyes that the books were correct and in balance was known by him to be untrue; Wm. S. Noyes gave a false receipt September 6, 1913, and the books were falsified through the fictitious entries of $3500 as going out of the treasury to Wm. S. Noyes and coming into the treasury from sales of quicksilver, etc.; the letter to the stockholders of September 30, 1916, stating that an effort should be made to recover the $1800 shortage, signed by

Wm. S. Noyes, B. S. Noyes and John W. F. Peat, was known by them to be false at the time, as they had more than three years before concealed said shortage, and after discovery of the same maintained that it was made good then.

It was vital to the case of defendants to have these facts concealed, for complainants were stoutly maintaining in the Federal Court that Noyes knew of the Osborn shortages before January 19, 1913. The witness Kniffin testified he knew before this date; that Gleim had informed him; the Willis letter shows plainly

> "This is the second and more serious instance of this in the history of the company" (539).

These other embezzlements and concealments prove what Wm. S. Noyes referred to in this letter dated January 23, 1913,—prove conclusively that January 19, 1913, was not the date of his earliest knowledge of Osborn's peculations; prove that the transfer of 28,607 shares of Osborn's stock in December, 1912, was not without excellent reason; prove that Wm. S. Noyes had acted vigorously when he learned from Gleim that Section 5 was on the market in November, 1912.

IX.

AGENCY OF WM. S. NOYES.

We have heretofore adverted to the relations existing between the Presidio Mining Company, the Silver Hill Mill & Mining Company, and Wm. S.

Noyes, and the triangular arrangements made between said parties in 1912-1913. We also have adverted to the relations existing during the same period between Wm. S. Noyes, Osborn, Mrs. Willis and Miss Doherty concerning the manipulations of the Presidio Mining Company stock. We also have dwelt upon the facts concerning the acquisition of Section 5 by Noyes, his management of the corporation after securing control of Section 5, and the majority stock through the biddable majority, the assaying methods and dollar differential, his derivation of all the profits from the enterprise, together with his profiteering in Texas.

Under this state of affairs, facts and circumstances, the rules of law applicable are clear. An agent, or one standing in the confidential relation Wm. S. Noyes bore toward the corporation and its stockholders and the several parties precludes his deriving benefits for himself under all the facts and circumstances.

The law touching agency under similar facts and circumstances involved in this case, is dealt with in the following citations:

2nd Ed. Mechem on Agency, Vo. 1, Secs. 1188, 1189, 1588, 1589;

2 Corpus Juris, 692;

Hofflin v. Moss, 67 Fed. 443;

Western States Life Ins. Co. v. Lockwood, 166 Cal. 191;

Gardner v. Ogden, 78 Am. Dec. 207.

It is the duty of the agent to account for his profits in addition to his salary, unless there is an agreement to the contrary.

U. S. v. Carter, 217 U. S. 305-310;
McKinley v. Williams, 74 Fed. 95;
Northern Pacific R. Co. v. Kindred, 14 Fed. 77;
Gardner v. Ogden, 78 Am. Dec. 207;
2 C. J. 697.

As to duty of the agent generally, see

U. S. v. Carter, 217 U. S. 305;
Wickersham v. Crittenden, 93 Cal. 29;
Western States Life Ins. Co. v. Lockwood, 166 Cal. 191;
Moore v. Building Assn., 45 S. W. 974.

As to the California law touching on the confidential relations of an agent, see

Civil Code, Sec. 2315. Authority of agent.
Civil Code, Sec. 1985. Everything an employee acquires in addition to his salary belongs to his employer. Construed in Burns v. Clark, 133 Cal. 638.
Civil Code, Sec. 2020. An agent must use ordinary diligence to keep his principal informed of his acts during his agency.
Civil Code, Sec. 2223. Involuntary trustee.

Civil Code, Sec. 2224. Gains made by fraud or violation of trust.

Civil Code Sec. 3517. No one can take advantage of his own wrong.

At the very time when said Section 5 was acquired, the original lease made, and the control of the corporation acquired by Wm. S. Noyes, he was the company's confidential employee, servant, superintendent, agent, director and officer, on whom all relied, and he should have measured up to his obligations.

A case showing to what extent the Supreme Court of the United States has gone where the confidential relation exists is illustrated in the suit of Strong v. Repide, 213 U. S. 419, in which the controlling owner of company stock was also the sole manager and in possession of all facts and information relative to the company business. The suit involved a portion of the Friar lands in the Philippine Islands. The United States government was negotiating for a purchase of these lands, including those of this particular company, managed by defendant Repide. Mrs. Strong owned 800 shares of the stock. If the lands were sold to the government the stock would be valuable. If not sold it would be practically worthless. Repide, knowing the conditions, and that on his decision to sell the stock would be valuable, purchased the stock through a broker from the agent of Mrs. Strong for about one-tenth its value. Repide concealed the information from the agents. It was held

that such a confidential relation existed as amounted to fraud to conceal his knowledge from the seller's agent. The court, after discussing the various decisions touching the ordinary relations between the directors and shareholders of a business corporation, and as to whether or not a fiduciary relation existed between the said parties, held (p. 431):

> "These cases involved only the bare relationship between director and shareholder. It is here sought to make defendant responsible for his actions, not alone and simply in his character as a director, but because, in consideration of all the existing circumstances above detailed, it became the duty of the defendant, acting in good faith, to state the facts before making the purchase. That the defendant was a director of the corporation is but one of the facts upon which the liability is asserted, the existence of all the others in addition making such a combination as rendered it the plain duty of the defendant to speak. He was not only a director, but he owned three-fourths of the shares of its stock, and was, at the time of the purchase of the stock, administrator general of the company, with large powers, and engaged in the negotiations, which finally led to the sale of the company's lands * * * to the Government at a price which very greatly enhanced the value of the stock."

Again (p. 432):

> "The inference is inevitable that at this time he had concluded to press the negotiations for a sale of the lands to a successful conclusion, else why would he desire to purchase more shares which, if no sale went through, were, in his opinion, worthless, because of the failure

> of the Government to properly protect the lands in the hands of their then owners?"

Approximately three months after the purchase of this stock Repide re-sold the same for about ten times what he had paid. On page 433 the court says:

> "After the purchase of the stock he continued his negotiations for the sale of the lands, and finally, he says, as administrator general of the company, under the special authority of the shareholders, and as attorney in fact he entered into the contract sale December 21, 1903. The whole transaction gives conclusive evidence of the overwhelming influence defendant had in the course of the negotiations as owner of a majority of the stock and as agent for the other owners, and it is clear that the final consummation was in his hands at all times. If under all these facts he purchased the stock from the plaintiff, the law would indeed be impotent if the sale could not be set aside or the defendant cast in damages for his fraud."

This decision illustrates the principle as affecting agency we are contending for in this suit. Wm. S. Noyes was the only man in the confidence of the corporation. Mrs. Willis relied implicity upon him. Osborn was entirely dominated by him. No other person knew anything of the corporation affairs, nor of the negotiations. On Noyes alone depended the success or failure of the company.

To paraphrase in the instant suit we might say, the concealment of his intentions by Noyes was not a mere inadvertent omission, an omission without any fraudulent or deceitful intent, but was a studied

and intentional omission to be characterized as part of the deceitful machinations to obtain the control of Section 5 and Section 8, without giving any information whatever as to the results of his efforts.

The whole transaction gives conclusive evidence of the overwhelming influence Wm. S. Noyes had over the other defendants as his nominees, and as the dominant factor with the majority stock under his control (reached by getting Osborn in his power), and finally consummating his ambitions to control Section 5 and Section 8, which he had until removed from power, with all their possibilities of profit to himself. All shown by his receipts of money amounting to $59,836.20 in addition to salaries, and an alleged claim of approximately $80,000 at the time of the submission of this case for decision in August, 1916.

If under all these facts Wm. S. Noyes obtained Section 5, the control of the Presidio Mining Company, and operated the entire property to his sole advantage, with his paid dummies and tools as his officers and biddable directors, the law would indeed be impotent if the entire transactions complained of could not be set aside as constituting fraud of the most vicious kind.

X.

SALARIES.

The interlocutory decree directs that an accounting be had as to the salaries paid to the officers of

the corporation, including the superintendent Gleim; that the Master hear testimony on behalf of the complainants and defendants in the suit and report his findings to the court (430, 433, 434).

Pages 376 to 399 of appellants' brief are devoted to a discussion of this subject. The finding of the trial court has been only that the fairness or unfairness be ascertained, and that the finding of the master be made thereon.

The master on the accounting might proceed upon one of two theories:

1. That where defendants have been found guilty of fraud, they may be denied any salaries whatsoever;

2. That notwithstanding a finding of fraud against the defendants, reasonable compensation might be paid them for services.

Appellants appear to be under the impression that because they controlled the majority stock of the corporation they could pay any salaries they saw fit. We fail to see where it was necessary to have a general manager in San Francisco at $450 per month, and likewise a second executive in the person of a president drawing a large salary of $150 per month, when the company was alleged to have had an efficient and able superintendent at the mine. We likewise fail to see where it was necessary for Peat, a former dummy president, to have had created for him the office of assistant secretary at $25.00 a month, when the embezzler Osborn was continued

at a monthly salary of $300 for services worth not over $75 a month.

We submit that the asserted right of these appellants to pay themselves the salaries drawn is not sustained by the evidence nor by authority.

In a case where directors who were also the majority stockholders holding five-sixths of the capital stock paid themselves exorbitant salaries, a New York court held:

> "Simply because they happened to hold a majority of the stock, which enabled them to elect themselves directors, and that they constituted all of the directors, gave them no right to vote themselves salaries. In doing so they were not occupying that impartial position which the law requires; in other words, self-interest might induce them to act to the prejudice of the other stockholder. Salaries cannot be voted under such circumstances, and, when so voted and paid, the money can be recovered back for the corporation, at the suit of an aggrieved stockholder."

> "It is also urged on the part of the appellants that the plaintiff failed to prove the salaries voted were excessive, and that the bad faith of the directors cannot be presumed. The suggestion is based upon an erroneous assumption as to the precise relation in which the defendants, as directors, stood to the corporation. They occupied a position of trust, and, when the fact appeared that they had voted themselves salaries by a resolution in which they all joined, then they were put in the position of trustees dealing with themselves, to their own advantage, with respect to their trust. In such case the presumption is that they acted in their own interest, to the prejudice of the

corporation, and the burden was upon them to overcome such presumption. Sage v. Culver, 147 N. Y. 241, 41 N. E. 513. This they entirely failed to do. A minority stockholder in a corporation has nothing to say about the management of its business and affairs, because the directors are elected by the majority. Notwithstanding this fact, a minority stockholder has some rights which the directors are bound to respect, viz., that the property of the corporation shall not be stolen or misappropriated under the guise and pretense of salaries of officers, and whenever such attempt is made, and the act by which it is attempted to accomplish that result is reviewed by a court of equity, it will not hesitate to compel the directors to do what they ought to have done, by way of restitution."

Davids v. Davids, 120 N. Y. Supp. 352.

See also

Strause v. Sylvester, 6 Cal. Unrep. Cas. 799; 66 Pac. 660;

Boothe v. Summit Coal Min. Co., 104 Pac. 210; 19 Ann. Cases, note p. 1260;

Schaffhauser et al. v. Arnholt etc. Brewing Co., 11 Amer. & Eng. Ann. Cases, 772, 773;

Wickersham v. Crittenden, 93 Cal. 17;

Brown v. Valley View M. Co., 127 Cal. 630-637;

Bassett v. Fairchild, 132 Cal. 653;

Loan Assn. v. Steinmetz, 29 Pa. St. Rep. 534;

Brown et al. v. DeYoung et al., 47 N. E. 863;

Williams v. McClave, 148 N. Y. Supp. 93-95;

Bosworth v. Allen, 85 Am. St. Rep. 667;

McNulty v. Corn Belt Bank, 45 N. E. 954-961;

Jacobson v. Brooklyn Lumber Co., 76 N. E. 1075-1079;
Miller v. Crown Perfumery Co., 109 N. Y. Supp. 760;
Jones v. Morrison, 16 N. W. 854-861;
Green v. Felton, 84 N. E. 166-170;
Gardner v. Butler, 30 N. J. Eq. 724-725;
Copeland v. The Johnson Mfg. Co., 47 Hun 235 (N. Y. Supreme Ct. Rep., Vol. 54);
Fougeray v. Cord, 24 Atl. 502;
Harrison v. Thomas, 112 Fed. 27;
Harder v. Sunset Oil Co., 56 Fed. 51;
2 Thompson on Corporations, Sec. 1762.

XI.

PRESUMPTIONS ON DESTRUCTION AND CONCEALMENT OF RECORDS AND ATTEMPTS TO WITHHOLD INFORMATION FROM COMPLAINANTS.

We have elsewhere discussed the attitude of defendants in concealing facts, falsification of records, destruction and disappearance of documents and files, and the wilful refusal, particularly on the part of B. S. Noyes, president, to permit complainant Overton to obtain access to the books in Texas. We have likewise called attention of the court to the disappearance of all the telegrams and letters pertaining to the transactions had between Wm. S. Noyes and this company, its officers, and his brother in December, 1912, and January, 1913 (app. 34).

We believe, as to the contents of the documents and telegrams, letters destroyed or concealed, the

false entries made in the books, the withholding of information which might be used as evidence against the defendants, the persistent attempts to prevent access by complainants to the records, the refusal to allow inspection of the books in Texas, and the general opposition to acquisition of full information by complainants, as attempted and carried out by the defendants, invokes the rule that the most unfavorable presumptions should be indulged in against said defendants, and the most favorable presumptions indulged in as affecting complainants, under the maxim *"omnia praesumuntur contra spoliatorem",* for

> "if a man by his own tortious act withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted."
>
> 1 Smith's Leading Cases, 9th Ed., p. 638.

We deem the subject of sufficient importance to present the following authorities:

English Decisions:

Gray v. Haig, 20 Beavan 219; Reprint 52 Eng. Rep. 587;

Dean v. Thwaite, 21 Beavan 621; Reprint 52 Eng. Rep. 1000;

From Lord Melville's Trial, 29 How. St. Tr., 1194-1195; cited in note to Hay v. Peterson, 34 L. R. A. 590;

Lupton v. White (15 Ves. Ch. 432, 439); Reprint 33 Eng. Rep. 817;

Armory v. Lelamirie, 1 Strange 505.

American Doctrine:

Cartier v. Troy Lbr. Co., 14 L. R. A. 470;
Hay v. Peterson, 34 L. R. A. 581;
Riggs v. Penn. & N. E. R. Co., 16 Fed. 808;
Pacific Coast S. S. Co. v. Bancroft & Whitney Co., 94 Fed. 198;
Kirby v. Tallmadge, 160 U. S. 379, 382.

California Decisions:

Bagley v. McMickle, 9 Cal. 446;
People v. Hurley, 57 Cal. 146;
Fox v. Hale & Norcross S. M. Co., 108 Cal. 415;
Leese v. Clark, 29 Cal. 665, 669;
C. C. P. 1963, subdivision 5.

Texts:

16 Cyc. 1058; 6, (b. c. d.);
Vol. 4, Wigmore on Evidence, Secs. 2524 (278), (285), (291);
Lawson Presumptive Evidence, 2nd Ed. 1899, Rules 22, 23, 24, 25 and p. 196;
Ency. of Evidence, Vol. 9, p. 958-962;
Ency. of Evidence, Vol. 13, p. 427;
Jones on Evidence (2nd ed.), Secs. 17-22.

XII.

ESTOPPEL.

We likewise believe it to be true in the instant suit that defendants, in view of their positive averments in their sworn answers relative to the own-

ership of stock by L. Osborn, and that Noyes acquired the stock in December, 1912, should not be permitted to press their claims in any way that Noyes was the owner of any of the Osborn stock from the year 1907.

> "The rule requiring consistency of action is not an arbitrary one, but is grounded upon the nature of courts of justice."
>
> Lilly v. Menke, 44 S. W. 732;
>
> Bigelow on Estoppel (6th ed.), p. 783.

> "Parties litigant are not allowed to assume inconsistent positions in court; to play fast and loose; to blow hot and cold. Having elected to adopt a certain course of action, they will be confined to that course which they adopt."
>
> Bensieck v. Cook, 19 S. W. 644.

XIII.

LACHES.

Appellants' brief (pp. 421-443) deals with this subject, although no exception on this ground is laid in the brief, nor do we find any reference thereto in the assignments of error. We have heretofore adverted to this question in our brief (p. 46), urging that the appellants have no right to be heard upon the subject. Nevertheless we answer appellants' assertion that laches exist.

The defense of laches is allowed, not as a punishment for the neglect of complainant, but to prevent inequity being done a defendant. It is only applied where a complainant with full knowledge

that his rights have been invaded has submitted to unconscionable delay, during which other rights have arisen founded upon his silence and acquiescence or detriment has been suffered. As is said in the case of

Lindsay Petroleum Co. v. Hurd, L. R. 5 P. C. 221-339:

> "Where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect, he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted, and either of these cases and delay are most material. * * * Two circumstances always important in such cases, are the length of the delay and the nature of the acts done during the interval which might affect either party, and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy."

The rule governing laches was announced many years ago in the case of Michoud v. Girod, 4 How. 503:

> "In cases of actual fraud, courts of equity give relief after a long lapse of time much longer than has passed since the executors in this instance purchased their testator's estate. In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, length of time ought not to exclude relief. * * * There is no rule in equity which excludes consideration of circumstances, and in cases of

> actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, and within 30 years after it has been discovered or becomes known to the parties, whose rights are affected by it."

And in the decision of Cutting v. Woodward, No. 3152, decided during this term by this court, Mr. Justice Gilbert says:

> "The appellant relies upon the defense of laches. The only assignment which brings that question before us is that the court below erred in overruling the motion to dismiss the complaint, one ground of which motion was that it appeared from the complaint that the plaintiffs therein were guilty of laches, in that the sale of stock complained of occurred in October, 1906, and the suit was not brought until February 19, 1913, 'by reason whereof the causes of action are barred'. This presents the question whether upon the allegations of the bill the delay in bringing the suit constitutes laches. The complaint alleged that the plaintiffs during all the times referred to therein were citizens and residents of the State of Illinois; that the appellant purposely, intentionally, and fraudulently concealed his fraudulent practices and the performance of said acts and doings from the plaintiffs and other stockholders by causing to be kept insufficient and inaccurate books of account and corporate records of the affairs of said company, and lulled the plaintiffs and other stockholders into seeming security by statements made by him that all the stockholders of the Trust Company should be jointly interested with him in all profits which might accrue out of any of his transactions with or pertaining to the business, property and affairs of the Trust

Company, and that he would hold the title of 1175 shares of stock of the Land Company in trust for the Trust Company, and that the plaintiffs were made to believe that the acts of the appellant so far as any of them were known to plaintiffs were for the best interests of the Trust Company and its stockholders, and that the appellant was honest in the performance of all such acts; that acting under such belief, plaintiffs made no careful investigation of the records and transactions of the appellant, and that they did not discover his fraud and fraudulent practices until on or about the month of January, 1913; that the appellant was the President and director of the Trust Company, and acted in a fiduciary capacity for and towards the plaintiffs. Taking these allegations to be true, they were sufficient we think to show prima facie that the causes of action were not barred. In *Bailey v. Glover,* 21 Wall. 342. Mr. Justice Miller said:

'In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud.'

"In that case the allegations of the complaint were that the defendants kept secret their said fraudulent acts, and endeavored to conceal them from the knowledge 'of the plaintiff, whereby he was prevented from obtaining any sufficient knowledge or information thereof until within the last two years.' In *Rosenthal v. Walker,* 111 U. S. 185, the court re-affirmed the rule that where it is sought to obtain redress against fraud concealed by the defendant, or which from its nature remains secret, the bar of the statute of limitations does not begin

> to run until the fraud is discovered, citing Bailey v. Glover, which case, said the court, 'has been often cited by this court but has never been doubted or qualified.' We followed and applied the doctrine of those cases in *Pickens v. Merriam,* 242 Fed. 363. In *Townsend v. Vanderwerker,* 160 U. S. 171, 186, it was said: 'The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether under all the circumstances of the particular case plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did.' "

We have cited numerous decisions on this subject heretofore in our brief (pp. 38-40), to which we here refer as further authority on this subject.

It is attempted in appellants' brief to weave into this pretended ground of laches the entire history of the corporation from 1907 to 1915, in order to predicate thereon some appearance of right, and then on such asserted claim build a 22-page argument. The facts of the case are clear, that Captain Overton and all the other members of the family, and all the other minority stockholders, had always presumed the officials of this company to be honest. They had a right to rely on this presumption. Particularly did they have full confidence in Wm. S. Noyes up to the time of the discovery of irregularities on or about the first of April during the first visit to the mine in Texas by Captain and Mrs. Overton on their return home from San Francisco.

In this state, subdivision 4 of Sec. 338, C. C. P., announces that the statute of limitations in cases of fraud is three years from the time of discovery. The distinction between limitations and laches is clearly set forth in the case of Wills v. Nehalem Coal Co., 96 Pac. 535, heretofore cited, to the effect that if suit be begun within the period of time specified by the statute of limitations, the burden of proof of showing laches is on the defendant. If the suit be brought after the period specified by the statute of limitations, the burden of proof to explain laches is on the plaintiff in the case.

In the instant suit it develops that Captain Overton first became suspicious about the first of April, 1915, and as soon as he was able to return home, arrange his affairs, consult other minority stockholders, arrange for support, that he at once returned and began a thorough investigation, and within four months from the date of discovery had filed suit in the trial court. It likewise is a fact that two years, eight months after the commencement of the manipulations most seriously objected to by complainants, suit was filed and litigation was under way to right the wrongs complained of.

It has not been shown that any detriment resulted to the defendants or any one of them through the absence of earlier action on the part of complainants. The activities of Captain Overton began the instant he discovered anything wrong, and they have been vigorously pressed ever since. Through these efforts the business affairs, history and trans-

actions of the Presidio Mining Company during the time complained of and in years past was uncovered. Surely under these facts and circumstances, and considering the serious nature of charges made, the involved and complicated matters, the concealments practiced, and the existence of fiduciary relations, the defense of laches is untenable. To prevent the application of the remedies applied in the face of all this fraud, particularly on the part of Wm. S. Noyes, under the pretense that there has been too long a delay in bringing this suit, would be such an injustice as to shock the conscience of any man with ideas of rectitude. It would be putting a premium upon dishonest practices and fraud of the most vicious and malignant type.

XIV.

KLINK BEAN & CO. REPORT.

Appellants dwell at considerable length on the Klink Bean report, which they attempt to construe as favorable to their contentions. An unbiased reading will show that it is not. Klink Bean & Co. disapprove the system of stope assays, hold that the bonus and the dollar differential are both unfair, and that the ores from Section 5 were essential to continued operations of Section 8 (987, 988), and though appellants attempt to gloss over these opinions, the fact remains that they are the most vital matters concerned in the report. Klink Bean & Co. say that *assuming* that the Presidio Mining Com-

pany could not buy Section 5, the contract was fair enough *because* it could be terminated on thirty days' notice. How does this help appellants? We have shown and the trial court has held that Wm. S. Noyes was in complete control of the Presidio Mining Company, and could and did prevent the company from breaking this contract which Lasky has shown to be wholly iniquitous. This suit is not concerned with the details of bookkeeping, but with the basic principles of fraud.

Of importance:

> "I have taken the books and records of the company as presented to me by the officials having them in charge and have taken the figures found in those books and records for the basis of my computations" (Klink, 1009).
>
> "I took the figures which I found and which were given to me by the officials of the company" (Cooper, 1015).
>
> "I want you to note the nature of our examination; we took things as they appear on the books and compiled our report" (Cooper, 1023).
>
> "I had no means of determining whether Section 5 and Section 8 were worked to the best advantage" (Cooper, 1016).
>
> "I do not know anything about the actual facts of the acquisition of Section 5 by Wm. S. Noyes in 1912 or 1913. I do not know as to the conditions under which the various contracts and resolutions were passed and adopted by the board of directors" (Klink, 1010).

That these books were falsely kept is naively passed over by appellants, and in order to make use of the Klink Bean schedules based on these very

books, appellants have been obliged to suppress and substitute figures, as has been already pointed out.

Two questions propounded to Mr. Klink comprehend his views. Asked if he would buy ore on a basis such as it was purchased by the Presidio Mining Company, he stated (1010, 1011):

"It would not be satisfactory to me."

Second, asked as an expert to place a value upon the services of a bookkeeper, he testified:

> "I am prepared to state what a reasonable salary for a bookkeeper to take care of the books in San Francisco would be; I should think about $75 would be about right" (1015).

Appellants have attempted to belittle this testimony of Mr. Klink by drawing a distinction between a secretary and a bookkeeper (brief, 383, 384, 385, 395). But they have themselves negatived this finely drawn distinction when they emphasize the fact of Osborn's being merely a clerk (brief, 120), and also where Wm. S. Noyes in his letter to Mrs. Willis says:

> "What I propose is as much for Osborn's protection as for yours and mine; he can keep the books but ought not to handle the cash, for this is the second and more serious instance of this in the history of the company" (539).

Obviously Mr. Klink meant $75 was sufficient for honestly kept books, not those kept falsely by an embezzler, with an assistant secretary who had as president signed the embezzling checks, and overlooked by B. S. Noyes, who permitted the omissions of entry and false entries (919).

XV.

INJUNCTION—RECEIVERSHIP.

1. General reply to appellants' brief on subject.

2. Reply to alleged financial conditions.

3. Authorities on injunction sustaining appellees' position.

4. Authorities on Receivership sustaining appellees' position.

1. General Reply to Appellants' Brief on Subject.

It is urged in appellants' brief (443-451) that no foundation existed for the application of injunctive relief. Pages 451-471 are devoted to a criticism of the alleged "expensive receivership". There is no foundation for such a statement as "expensive receivership", for there is no evidence in the record showing that the receivership is expensive, extravagant, or not justified. The receivership is justified, it is not expensive, and the company was never so efficiently managed nor producing such profits for all the stockholders as it is doing now.

It is further urged that there was no showing by the complainants that the defendants were not able to respond to a decree of the trial court, nor that any proof was adduced showing the insolvency of defendants. The evidence does not disclose anywhere any ability on their part to respond to the decree of the trial court, and no showing was made by them that they intend to abide by its decision. In partial substantiation of our statements we refer

to appellants' 471-page brief showing their determined resistance to the decrees of the trial court.

Appellants' pretended offer (brief, 447-449) to deposit in court the company funds, and assuming this prerogative after their conviction of gross fraud, is a most astounding and preposterous proposal. What right have they to assume and determine what the judgment against themselves is to be after the accounting, considering Section 5 accounts, thefts of Osborn, secret side profits of Wm. S. Noyes, salaries, directors' fees, interest on said moneys involved, to say nothing of attorney's fees, costs and expenses? The findings of the Master in Chancery have not been settled, nor has a final decree been entered. It may be that their entire holdings will not suffice to respond to the final decree, to say nothing of their possible continued manipulations. What might prevent disposing of all the Osborn stock to third parties if not impounded, as the facts at the time of the granting of injunction indicated they were about to do (291-300)? What might prevent the encumbering of Section 5, or disposing of it to third parties, by Wm. S. Noyes, if permitted to retain the title in his own name without any restrictions, and force complainants to initiate further protracted and expensive litigation either in the courts of California or Texas to quiet title to said property? What to prevent the attempted damage, destruction or ruin of the mine and plant by beaten, vindictive and desperate defendants, if permitted to remain in control of the company operations?

The past conduct of defendants as dominated by Wm. S. Noyes controlling the company, evidences an utter disregard for the rights of minority stockholders. How could a decree capable of complete enforcement be sustained with a control remaining in the hands of said defendants, with full and untrammeled power to attempt, if not actually to thwart and oppose every order of court made? A chancellor of the capacity, ability, training and experience of the trial court is not going to see his decree and orders nullified, nor even open the door for interference, by giving opportunity to the defendants in this suit found guilty of the acts and deeds complained of under the control and domination of Wm. S. Noyes, to thwart, block, or hinder their enforcement. The injunctions, decrees and orders appointing the receiver were right and should be affirmed.

2. Condition of Company January 24, 1918, as Reflected by Affidavit of B. S. Noyes January 28, 1918, Accompanying Defendants' Objections to the Appointment of a Receiver (360-369) Versus the Pretensions of Appellants' Brief, page 391.

An analysis of the financial situation discloses a startling condition, very different from what is pretended by appellants.

We have shown how appellants suppressed the assets reported in Klink Bean schedule 15, on pages 89, 90 of their brief, and likewise, on page 93 thereof, suppressed the liabilities in order to try to make the company appear impoverished in the so-called

"crucial period" of 1913, and to try to make it appear prosperous August 28, 1916.

On page 391 appellants, in their brief, have again suppressed liabilities in the table they present, which table they allege shows such a prosperous condition of the company on January 24, 1918, that the appointment of a receiver was in no wise necessary for the protection of any of the stockholders of the company.

This presentation to the court has been made by careful extraction of certain figures from the transcript (362, 363). A true rendition as presented to the trial court by defendants reveals an absolutely bankrupt condition of the company had Wm. S. Noyes been permitted to force his alleged claim. It was solvent only because of injunctions granted complainant December 28, 1915, restraining Wm. S. Noyes from drawing any further sums on account of his alleged one-half of the net.

As January 24, 1918, was indeed a "crucial period" and that of granting the receiver, we shall prove by B. S. Noyes' own affidavit (in which he made the best showing he could, since he was using it to base his objections to said receivership on the ground of prosperity of the company) that the company was insolvent except for the protection of the trial court.

We quote verbatim from appellants' brief (p. 391):

Cash and bullion in San Francisco...	$63,912.03
Liberty bonds	25,000.00

Cash in Savings Bank, Marfa, Texas.	15,000.00
Cash in Marfa National Bank, Marfa, Texas	43,154.46
Mining supplies at Shafter Texas....	45,183.50
Permanent equipment since January 1, 1913	157,036.28
Total	$349,286.27

(365)

Less amount due William S. Noyes as one-half the net from Section 5. The record does not disclose this amount, but the best possible estimate seems to be	$110,000.00

We contrast it with B. S. Noyes' sworn statement from which it was derived (362, 363, Transcript):

(1) In cash and bullion in San Francisco, the sum of	$63,912.03
(2) In Liberty bonds, the sum of....	25,000.00
(3) Cash in Savings Bank at Marfa, Texas, the sum of	15,000.00
(4) Cash in Marfa National Bank, Marfa, Texas, the sum of	43,154.46
(5) Supplies on hand at the mine at Shafter, Texas, as of January 1, 1918, the sum of	45,183.50
Making a total of net liquid assets of	$192,249.99

From this literal rendition of B. S. Noyes' sworn statement we find:

Total liquid assets claimed	$192,249.99
Deducting January operating costs of	24,800.00
and the income tax claimed due (362,363)	50,000.00
Leaves liquid assets over liabilities made up of cash, bullion in transit and supplies, the sum of	$117,449.99

Appellants admit (brief, 391) that the "best possible estimate of the amount due William S. Noyes" is 110,000.

Leaving a total of cash, bullion in transit, mining supplies at Shafter, Texas, Net worth........ $7,449.99*

So, from a Net Worth of $48,212.11 December 31, (1912, K. B. Sch. 15, 1008), the company has tobogganned to only an alleged Net Worth of $7,449.99 on January 24, 1918. From the famous overdraft of $3303.72 December 31, 1912, we find that on January 24, 1918, the company owed the miners and Wm. S. Noyes $37,733.51 more than its cash, bullion and bonds can pay except for the protection of the court.

There remains only the claim of "Permanent equipment since January 1, 1913, $157,036.28" (391 brief), upon which to base even a pretense of a claim of good management. These figures are just as misleading as those brought about by actual suppressions of figures representing assets or liabilities. Appellants try to leave the impression that they have expended $157,036.28 and that for it the company has a brand new plant, with new engines, new pumps, new everything, all with the paint unscratched; whereas a study of the items making up this sum (368,369) in said sworn statement as presented by B. S. Noyes show that the "Cyanide

* Of this Net Worth $45,183.50 were mining supplies (362,363) leaving a *deficit* of $37,733.51 cash, bonds and bullion in transit to pay outstanding obligations. Appellants in their brief state that one cannot pay bills with supplies.

plant $33,582.39" built in 1913, is carried January 24, 1918, as if it had no old or worn parts. Indeed, we find the word "New" used in these tables as follows:

1914.	New Crusher at mine,	770.00
1915.	3 New classifiers,	9683.00
1917.	New hoist at South Shaft,	2986.80

So our machinery, like all other machinery (particularly mining) wears out. The brand new oil-burning engine of 1912 that placed the plant in a "most excellent condition" has also probably worn out, for the list of permanent improvements includes "oil engines in power house, $23,985.82".

B. S. Noyes, president of the Presidio Mining Company, making sworn returns to the United States Government on Presidio Mining Company income, and B. S. Noyes, defendant, presenting figures to this court, are two very different men. We quote verbatim from the United States income tax return sworn to on February 17, 1916, by B. S. Noyes, president, and John W. F. Peat, secretary, for the income for the year 1915 (Ex. 14):

Under "5(b) Depreciation...$11,875.10"

Itemized as follows:

	Cost.	Amount of depreciation this year.
"Mill,	$86619.45	8661.95
Rope tramway,	24772.30	2477.23
Tracks,	7359.25	735.92
Total,	118751.00	11875.10"

Therefore, since B. S. Noyes, president of the Presidio Mining Company, swears off a 10 per cent depreciation for one year on the cyanide plant, we will do likewise. Said table of B. S. Noyes (leaving out details) summarized reads:

1913,	installations,	$40,941.64
1914,	"	42,094.17
1915,	"	9,683.00
1916,	"	5,700.00
1917,	"	58,617.47
Total,		157,036.28

Taking ten per cent per annum depreciation, we arrive at a total depreciation of $47,220.16, leaving $109,816.12 as the present value of plant. This depreciation is more favorable to defendants' position than B. S. Noyes' own figures to the United States government, because for 1915 he swears off $11875.10 depreciation in value of plant, whereas applying the above method marks off only $9271.88 for said year. The $157,036.28 cost for installations becomes $109,816.12 on a presentation more favorable to defendants than B. S. Noyes presents to the government. Our mill has had five years' wear since 1913, and our ore reserves, which are the actual measurement of the life of a mine, have suffered five years' exhaustion as well. We have an old worn plant, empty ore cavities, not enough cash and bullion by over $37,000 to pay our alleged bills, but fortunately for the company, the trial court paid no heed to defendants' objections to the ap-

pointment of a receiver, but put one in charge of the company.

Why should Wm. S. Noyes and his tools, with no capital investment, get all the profits and the minority stockholders get an old worn out mill, empty ore pockets, empty coffers? Who can estimate what the company would have earned had the management been honest—and either their figures to the court are not honest, or the report to the United States government is not. Of this there can be no argument. The following are from the sworn income returns to the United States government, the affidavits being made by B. S. Noyes, president:

For year ending	Net Income	Loss	Indebtedness	Interest Paid	
Dec. 31, 1913	$7882.73		14,000.	68.36	(Ex. 12)
" " 1914		18105.78	26,000.	1392.79	(Ex. 13)
" " 1915	8334.20		61,553.40	366.28	(Ex. 14)

The foregoing table shows that for the years 1913, 1914 and 1915 B. S. Noyes reported to the federal government an actual loss of $1888.85. This should be presumed to be the truth, because sworn to by B. S. Noyes, an attorney and experienced in the keeping of books.

3. Authorities on Injunctions Sustaining Appellees' Position.

We have heretofore mentioned the two injunctions granted in the case:

* On note............$1226.70
"On overdrafts...... 166.09"
Interest paid 1914...$1392.79

** On notes...............$304.71
"Various advances from Selby Smelting and Lead Co. .... 61.57"
Interest paid 1915.......$366.28

First, dealing with Section 5 and preventing payments of money on Section 5 account to Wm. S. Noyes, directly or indirectly, or to any of the other parties in the case, and preventing the transfer or encumbering of said property;

Second, impounding the Osborn stock.

The rule concerning injunctive relief is well settled where questions of fraud are involved. It is an ancillary remedy, and while not to be lightly used, it is nevertheless within the discretion of the trial court to apply the remedy when facts warrant its application.

In Pomeroy on Equity Jurisprudence, it is said:

> "Sec. 1339. The jurisdiction to grant injunctions restraining acts in violation of trusts and fiduciary obligations, or in violation of any other purely equitable estates, interests, or claims in and to specific property, is really commensurate with the equitable remedies given to enforce trusts and fiduciary duties, or to establish and enforce any other equitable estates, interests or claims, with respect to specific things, whether lands, chattels, securities or funds of money, or to relieve against mistake, or fraud done or contemplated with respect to such things. In all such cases the question whether the remedy at law is adequate cannot arise; much less can it be the criterion by which to determine whether an injunction can be granted; for there is no remedy at law. Since the estate, interest, or claim of the complainant is purely equitable, it is exclusively cognizable by equity; and if its existence is shown, a court of equity not only has the jurisdiction, but is bound to grant every kind of remedy necessary to its complete establishment, protection and enforcement according to its essential nature.

Many breaches of trust are of such a nature that, if accomplished they would completely defeat the right of the beneficiary to the specific trust property. The equitable reliefs against mistake or fraud with respect to specific equitable property, and the equitable remedies of all kinds to enforce trusts, express or by operation of law, and fiduciary duties concerning specific property, and to enforce any other equitable estate, interest, lien, or right in or over specific property, would be of comparatively little practical value, unless the court could by injunction restrain the alienation, transfer or encumbrance of such property, and all other modes of dealing with it which would prejudice the rights of the complainant, and prevent him from acquiring the title, or from enjoying his estate, or from enforcing his claim, or from receiving the full benefits of final relief.

"It may therefore be stated as a general proposition that whenever the equitable relief against mistake or fraud with respect to specific property, or the equitable remedy of enforcing trusts or fiduciary duties concerning specific property, or of enforcing any other equitable estates, interests or claims in or to specific property, *requires the aid of an injunction,* a court of equity has jurisdiction, and will exercise that jurisdiction, to grant an injunction, either pending the suit, or as a part of the final decree, to restrain a breach of trust or of fiduciary duty, or to restrain an alienation, transfer, assignment, encumbrance, or other kind of dealing with the property, which would be in violation of the trust or fiduciary duty, or in fraud of the complainant's rights, and which would therefore interfere with and prejudice the ultimate remedies against mistake and fraud. The particular instances to which the doctrine is applied are almost numberless, and extend throughout the entire range of equitable remedies against mistake and fraud, or to

enforce trusts and fiduciary duties, or to establish and enforce other equitable estates, interests, liens and primary rights in and to specific property of any kind or form * * *

Sec. 1345. As has already been stated, an injunction will always be granted, if necessary, to protect, aid, or enforce any equitable estate, interest or primary right, or to secure and render efficient any purely equitable remedy. Among the most important instances in which this general doctrine is applied, in addition to those already mentioned, are the following: Against corporations and their directors and officers, to restrain acts which are illegal, *ultra vires,* or in violation of their fiduciaries."

The author cites numerous cases in support of the above, including the following cases involving the granting of injunctions "to restrain unlawful acts of directors or managing officers in violation of their fiduciary duties":

Cannon v. Trask, L. R. 20 Eq. 669;
Dowling v. Pontypool etc. R'y, 18 Eq. 714;
Featherstone v. Cook, L. R. 16 Eq. 298;
Mair v. Himalaya Tea Co., L. R. 1 Eq. 411;
Carlisle v. South East Ry., 1 Macn. & G. 689.

In High on Injunctions (4th ed.), Sec. 1203, the author says:

"The protection of the rights of shareholders in incorporated companies against the improper or illegal action of other shareholders, or of the officers of the company, is a favorite branch of the jurisdiction of equity by injunction. And it may be asserted as a general rule, that courts of equity may enjoin, in behalf of the stockholders of an incorporated company, any improper alienation or disposition of the

corporate property for other than corporate purposes, and will restrain the commission of acts which are contrary to law and tend to the destruction of the franchise, as well as the improper management of the business of the company, or a wrongful diversion of its funds or from depriving plaintiff of his rights as a corporator."

In a note to the above are cited, among other cases, the following cases involving suits to enjoin the fraudulent and wrongful acts of directors and officers in the management of corporate property:

Sears v. Hotchkiss, 25 Conn. 171;

Harding v. American Glucose Co., 182 Ill. 551; 55 N. E. 577;

Bixler v. Summerfield, 195 Ill. 147; 62 N. E. 849.

In Ashton v. Dashaway Assn, 84 Cal. 61, Mr. Justice Sharpstein, after quoting from a Rhode Island decision as to the jurisdiction of equity in reference to the misappropriation of corporate funds, goes on to say (p. 67):

"In accordance with these principles, it has been held that a stockholder may restrain the directors from paying an unfounded claim of the secretary for extra services (Butts v. Wood, 37 N. Y. 317) and may compel the repayment of funds misappropriated by the directors (Sears v. Hotchkiss, 25 Conn. 177) * * * and may prevent corporate securities from being misapplied to the benefit of other corporations (Chicago v. Cameron, 120 Ill. 447) * * * and may prevent the conversion of the corporate assets by the officers (Atlanta R. E. Co. v. Atlanta Bank, 75 Ga. 45); and may have restrained acts which amount to a violation of

trust or a breach of the charter. (March v. Eastern R. R. Co., 40 N. H. 458; Wilcox v. Bickell, 11 Neb. 154; Manderson v. Commercial Bank, 28 Pa. St. 379); or which amount to a fraud upon the company (Ryan v. L. A. & N. W. R. R. Co., 21 Kan. 365) * * *

"In California the rule was laid down in Wright v. Oroville M. Co., 40 Cal. 20, in which case * * * Wallace, J., delivering the opinion, said:

"It is settled that courts of equity in this country will, at the instance of a stockholder, control a corporation and its officers, and restrain them from doing acts even within the scope of corporate authority, if such acts when done would, under the particular circumstances, amount to a breach of the very trust upon which, as we have seen, the authority itself has been conferred. (Dodge v. Woolsey, 18 How. 341).

"And the relief does not depend upon the existence of a fraudulent intent, although such intent very frequently exists."

In Pond et al. v. Vermont Val. R. Co. et al., 12 Blatchford 280, Fed. Cas. No. 11,265, which was an action brought in the United States Circuit Court, by citizens of Connecticut, as stockholders in a Vermont railroad corporation, to restrain the execution of a lease of the railroad of the corporation to another corporation, alleging that such execution was contrary to the rights and interests of a majority of the stockholders, and a fraud upon such rights, the court said (19 Fed. Cas., p. 979):

"It is not insisted and cannot be successfully claimed, that the matters complained of herein are not of equity cognizance; or that a court having general jurisdiction in equity has no

jurisdiction, at the instance of stockholders, to restrain a corporation, or those engaged in the control and management of its affairs, from acts tending to the destruction of its franchises, or violations of the charter, and from misuse or misappropriation of the corporate powers or property, or other acts prejudicial to the stockholders, amounting to a breach of trust on the part of the managers. Dodge v. Woolsey, 18 How. [59 U. S.] 331, and numerous cases cited in the opinion in that case; and see Bacon v. Robertson, 18 How. [59 U. S.] 480, 488; Smith v. Swormstedt, 16 How. [57 U. S.] 288."

In New Albany Water Works et al. v. Louisville Banking Co., 122 Fed. 776, which was a suit in equity to enjoin an alleged breach of trust by the directors of the corporation, or other violations of corporate duty, District Judge Seaman, speaking for the Circuit Court of Appeals for the 7th Circuit, said (p. 778):

> "The right of a single stockholder to sue in equity to enjoin violations of the corporate franchise—and in the federal court when he is a citizen of another state—upheld in the leading case of Dodge v. Woolsey, 18 How. 331, is now well setablishd. 5 Rose's Notes, U. S. Reports, 587. * * * Jurisdiction, therefore, is undeniable, of a stockholder's bona fide bill to restrain an alleged breach of trust by the directors or other violation of corporate duty. Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 553."

See, also,

Vol. 4, Rose's Notes to U. S. Reports (4th ed.), pp. 1061 et seq.

4. Authorities on Receivership Sustaining Appellees' position.

Concerning the necessity of receivership in the instant suit: As heretofore stated, appellants urge that there was no showing of insolvency or inability on their part to respond to a decree. There certainly is no showing that appellants could respond to a final decree not yet entered. Appellants' brief passes by and overlooks the main point, i. e., the prevention of their continued fraudulent and wrongful acts under the domination of Wm. S. Noyes. The appellants have all been found guilty of fraud, for, as stated by Mr. Justice Gilbert, speaking for this court in Cutting v. Woodward, No. 3152, recently decided:

> "The court below found that during all this period the appellant had virtual control of the majority of the board of directors, and that they were ever ready to do his bidding. These transactions constitute actual and not constructive fraud."

In a case very similar in its facts to the instant suit a receiver was appointed.

> Meeker v. Winthrop Iron Co., 17 Fed. 52; affirmed 109 U. S. 180.

In a California case in which the bill alleged fraud and unlawful profits through breach of the fiduciary relations by certain directors a receiver was appointed.

> Aiken et al. v. Colorado River Irrigation Co. et al., 72 Fed. 591, 593.

In a suit by minority stockholders against the directors charging fraud, held, where the majority stock dominated to the detriment of minority for the benefit of majority, an injunction may be granted if it will reach the evil, but where necessary a receiver will be appointed, even if the company is solvent.

Columbia Natl. Sand Dredging Co. v. Washed Bar Sand Dredging Co., 136 Fed. 712.

Where gross fraud exists a receiver is proper; likewise referring to officers and directors of corporations.

Carson v. Allegany Window Glass Co., 189 Fed. 796.

A late California decision, Boyle v. Superior Court, 54 Cal. Dec. 718, citing subdivision 6, Sec. 564, C. C. P., holds that a receiver may be appointed in cases where receivers have heretofore been appointed by the usages of courts of equity. In this case a receiver was appointed because of a deadlock in the board of directors. This decision is a departure from the general trend of the California decisions, and aids in harmonizing our local decisions with the general authority of the various jurisdictions. See comment on this case in California Law Review, March, 1918, p. 223.

A case construing a code provision similar to the California statute is Gibbs v. Morgan, 9 Idaho 100; 72 Pacific 736, 737.

In Archer v. American Water Works Co., 24 Atl. 515, which was a case of officers and directors of

a corporation manipulating affairs of the Denver water works, the court held:

> "The bare statement of the facts makes it plain that the scheme of Mr. Venner and his party is that Mr. Venner shall control the company by depriving others of their rights. The execution of such a scheme is a fraud."

It was a scheme of Wm. S. Noyes to enrich himself and deprive others of their rights in the instant suit, which led not only to the litigation, but to his and all defendants' ultimate removal from the corporation management.

In Fougeray v. Cord, 24 Atl. 504, the corporation control was taken away from the guilty parties. The court observes in this case that it would be a reproach to the administration of justice to doubt the power and duty of the court in such a case. Said case is similar in some respects to the instant suit now on appeal.

Another case of corporate mismanagement is Hall v. Nieukirk, 12 Ida. 33; 85 Pac. 488, 489.

A further fraud case is Exchange Bank v. Bailey, 116 Pac. 814, 815.

In a Washington case of a one-man control through a deadlock in the directorate, who controlled the corporation for his own ends to the detriment of others, it was held that a receiver should be appointed, and if necessary, wind up the corporation.

> Boothe v. Summit Coal Min. Co., 104 Pac. 212.

An especially well reasoned Michigan case is that of Miner v. Belle Isle Ice Co., 17 L. R. A. 419, in which it is held:

> "This corporation has utterly failed of its purpose, not because of matters beyond its control, but because of fraudulent mismanagement and misappropriation of its funds. Complainant has a right to insist that it shall not continue as a cloak for a fraud upon him, and shall not longer retain his capital to be used for the sole advantage of the owner of the majority of the stock, and a court of equity will not so far tolerate such a manifest violation of the rules of natural justice as to deny him the relief to which his situation entitled him. I think a court of equity, under the circumstances of this case, in the exercise of its general equity jurisdiction, has the power to grant to this complainant ample relief, even to the dissolution of the trust relations."

The Presidio Mining Company as managed had failed of its purpose. The necessary remedy was a receivership.

A very complete discussion of the subject of receivers is found in the case of Brent v. B. E. Brister Sawmill Co., Am. Ann. Cas., 1915B, p. 576; 103 Miss. 876; 60 So. 1018. In this case numerous authorities are cited by the court, and likewise there is appended thereto a very complete note on page 581 of said report. It was held:

> "A court of equity can, at the instance of minority stockholders, on a showing of maladministration by the officers supported by the majority, appoint a receiver for a going and solvent corporation, to take charge of its busi-

ness, and, if it be shown to be necessary, to wind up its business."

In said case it was charged that the president and general manager of the company failed and refused to give proper and definite information of the company affairs; refused to have the books of the company audited; refused to give minority stockholders information; refused to listen to a minority protest against the continuation of the president in office; but in spite of all protests, re-elected the president and continued his salary at $5000 per year. It was shown in the pleadings filed that the majority control operated the corporation to their own profit and benefit. In its discussion the court, on page 578 (col. 2) says:

> "We know that in the past the courts have laid down as a general rule that a court of equity, in the absence of statutory authority, is without jurisdiction at a suit of a stockholder to wind up the affairs of a solvent going corporation, or to appoint a receiver with that end in view; and we understand that this rule has been based upon the reason that a corporation is the creature of the state and its life depends upon the action of the state, or of the stockholders as a whole. We find that in the progress of time and in the development of the jurisprudence of our land this rule has been somewhat changed, and the power of a court of equity has been enlarged for the purpose of more fully protecting the interests of all those owning interests in corporations."

Continuing, the court holds:

> "It is certainly the duty of the officers and directors of a company to conduct its affairs

> so as to carry out the purposes of its organization to succeed in the business enterprise in hand, to preserve its property, and to recognize and protect the rights and claims of all parties in interest. If they fail in doing this, it is then their duty to bring the affairs of the company to a conclusion."

Quoting from the case of Miner v. Belle Isle Ice Co., p. 579:

> "It is the essence of the trust that it shall be so managed as to produce for each stockholder the best possible returns for his investment."

On page 580, after referring to the hesitancy of courts to interfere in the management of corporations:

> "'It may be further said that this court has never denied power in a chancellor to prevent a scheme of irreparable injury and wrong, merely because the movers in that scheme speak and act in a corporate capacity rather than in an individual capacity.' That solvent corporations are wrecked for purely selfish and illegal purposes, that minority interests are 'frozen out', that business immorality has run amuck under the assumption that courts are powerless, is too true. But the assumption is wrong. Judicial hesitancy does not mean judicial atrophy or paralysis. The board of directors of a corporation are but trustees of an estate for all its stockholders, and may not only be amenable to the law, personally, for a breach of trust, but their corporate power under color of office to effectuate a contemplated wrong may be taken from them when, by fraud, conspiracy, or covinous conduct, or extreme mismanagement, the rights of minority stockholders are put in imminent peril and

> the underlying, original, corporate *entente cordiale* is unfairly destroyed. It would be a sad commentary on the law if, when the trustee of a corporate estate is making an improper disposition of it, or has shown improper partiality toward one of its conflicting parties, or has put the estate in a fix where it is liable and likely to be either wasted or destroyed, or mercilessly taken from all and given to a part, a court could not reach out its arm and preserve and administer the estate. We have never so declared the law."

In the case of Ashton v. Penfield, cited in the notes to said case (p. 583) in which a receiver was appointed, the court says:

> "The conspiracy charged is proved in its scope and ultimate purpose. Fraud and extravagant and corrupt mismanagement for personal and by-ends, long persisted in and still existing, whereby the rights of shareholders have been grievously hurt, make up the miserable story of the life of this corporation. Its affairs and books have been put and kept in confusion. The truth is hid away in bad bookkeeping. Mrs. Ashton having a right to see into its affairs was arbitrarily fenced off and denied the right to look. Either an ingrained inability or lack of disposition to protect the corporation from being used as a personal convenience and perquisite of Penfield is shown. That Penfield is not a suitable person to have charge is shown. That he controls his wife and sister-in-law, thinks for them and acts for them, and that they do as he bids them do, sufficiently appears. That with knowledge of his misdoings and evil purposes they put and keep him in charge of the corporation as its only active officer and sole manager sufficiently appears. They seem to be one and all unfaithful stewards as trustees of a trust estate, hence

have forfeited the right to control that estate, however much they may masquerade under cloak of a majority of the stockholders."

Jurisdiction of courts of equity in suits affecting real property in another state or country is discussed in

Fall v. Eastin, 23 L. R. A., N. S. 924;
McGee v. Sweeney, 84 Cal. 100.

XVI.

CONCLUSION.

The appeal in this suit was initiated March 19, 1918. Many continuances were thereafter obtained by appellants. On November 1, 1918, this court was notified of appellees' objections to further continuances. The record was immediately filed, printed, and delivered to both appellants and appellees. On February 21, 1919, appellants served upon appellees their 471-page brief, printed in 11 point and 10 point type. The foregoing date was the last day permitted under the rule for said service, as both the 22nd and 23d of February were holidays.

Either the procrastination in serving the brief upon appellees was a part of a wilful plan to present a long, complicated and involved argument in the endeavor to render impossible an answer prior to the time of argument, or an inexcusable neglect to afford appellees a fair opportunity to prepare *and*

print an argument such as is required in this present lengthy appeal.

For this reason, the numerous authorities cited by appellants are not analyzed to any extent by appellees in their brief. Such an attempt within this very brief time would be a physical and mental impossibility. On the other hand, we do not deem it essential to answer the citation of numerous authorities, for the argument is built upon an impossible hypothesis, false premises, misstated and distorted facts, and it therefore reaches erroneous conclusions.

The law applicable to the facts in this suit is clear concerning agents and fiduciaries standing in a confidential relation to the principal. It is particularly applicable to the relations existing between Wm. S. Noyes and Presidio Mining Company. The agent must deal fairly with his principal. He must fully disclose all matters vitally affecting his principal's interest. He must not practice concealment. He must surrender any profits made by him through his employment, other than his lawful compensation, while in this fiduciary relationship, unless permitted by the principal to retain such profits. This rule likewise applies to directors and officers of corporations. Any gains derived by them from their acts, even though the corporation suffer no damage, at the election of any minority stockholder will be closely scrutinized, and unless fully explained, will be set aside and said officers called upon to account. The burden of proof is

on them to show their acts fair, open, unconcealed, and that no advantage has been taken of the principal.

Appellants urge that fraud must be proved and cannot be inferred. They overlook:

> "The chief exception to the general rule that fraud will not be presumed, but must be proved, arises from the existence of fiduciary or confidential relations between the parties. It is well settled that where it appears that such a relation existed between the parties at the time of the transaction alleged to be fraudulent, as, for instance, the relation of trustee and *cestui que trust,* principal and agent, * * * or that one of the parties for any reason possessed a power or influence over the other, or that one of the parties was laboring under disability such as mental weakness or intoxication, the existence of such relation or such power or influence, or such disability, raises a presumption of fraud, and the burden of proof is upon the party seeking to sustain the transaction."
>
> Vol. I, Ann. Cases, 811, and decisions cited.

It is likewise held, in Taylor v. Taylor et al., 8 How. 198:

> "The rules of law supposed to control the contracts of parties who do not stand upon a perfect equality, but who deal at a disadvantage on the one side, whether applicable to the relations of parent and child, trustee and *cestui que trust,* attorney and client, or principal and agent, have been laid down in various cases in the courts, both of England and of our own country. To trace these rules to the several cases by which they have been propounded would be an undertaking rather of curiosity, than of necessity or usefulness here, as the ex-

> tent to which this court has applied them, or is disposed to apply them in cases resembling the present, may be found within a familiar and direct range of inquiry."

Citing Justice Story, Eq. Jurisprudence, Vol. I, Sec. 307.

The quotation, after referring to a relation between the parties which compels one to make a full discovery to the other, or to abstain from all selfish projects, proceeds:

> "But when such a relation does exist, courts of equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance."

It is likewise urged that presumptions of uprightness and honesty are to be inferred rather than a guilty purpose; nevertheless the trial court is the arbiter, to decide what inferences shall be drawn. For, as stated in Ryder v. Bamberger, 172 Cal. 799,

> "an inference is but a reasonable deduction, and conclusion from facts proven, which court or jury is entitled to draw."

In the instant suit the trial court having inferred fraud from the proof, it is a presumption that must yield to the overwhelming evidence adduced in said court. Unless there is a gross abuse in the exercise of judicial discretion and power, the decree is not lightly to be set aside.

The trial court very carefully examined the pleadings, the evidence, the facts, and the arguments in

the case. Defendants were given a fair and impartial trial. No word of complaint has been uttered by them in this respect. They were given every opportunity to fully explain the transactions complained of. On August 29, 1916, the case was orally argued one whole day. And subsequently a 20-page typewritten brief was filed by complainants, one printed brief containing two arguments by defendants, consisting of 95 pages and 50 pages, respectively, and a closing printed brief of complainants containing 115 pages, with the appendix, were filed, and the case submitted December 2, 1916, for decision. A complete typewritten transcript of the testimony and the oral arguments was furnished to the court. After having the case under submission one year the trial court delivering its oral opinion stated (418):

> "I have taken occasion to carefully review the evidence in the case in its entirety, and likewise I have very carefully considered the oral argument, the briefs and the authorities. My conclusions, arrived at reluctantly because of the fact that they involve a finding of fraud upon the part of the defendants, have been definitely reached, however, in favor of the plaintiffs' case."

It is urged that Wm. S. Noyes is now no longer young; that he wishes his good named cleared. We have been compelled to expose the conduct of the directors and officers of this corporation, including Wm. S. Noyes, in controlling and manipulating its affairs, in order to secure equitable relief. Wm. S. Noyes has had sixty years and upwards in which

to learn that the standards of truth, integrity and honor are not to be lightly violated nor brushed aside; that others have rights which must be respected; that a man cannot serve two masters, himself and another, at the same time.

The instincts of the primal man were to take by force whatever he desired. The same primal instinct still runs through certain members of human society. For the good of all, therefore, it has been found necessary to prescribe and enforce rules of human conduct, in order that there may be safety and security of life and property. Out of our civilization has evolved the great body of our law, which must be respected, for, in the words of Hooker,

> "the very least feel her care, and the greatest are not exempt from her power."

The appellees' position always has been and now is to protect the rights of the minority which they represent, in addition to their own interests, which last named have cost appellees' family $60,000.00 of real money. Appellants have paid nothing for their stock. The minority in the Presidio Mining Company are entitled to consideration. The smallest stockholder is entitled to insist on the exercise of sincere and honest effort on the part of the officers of this corporation in its management and conduct of its affairs. When said officials are found wanting, said minority must look to a court of equity, whose

> "powers are as vast, and its processes and procedure as elastic, as all the changing emergen-

cies of increasingly complex business relations and the protection of rights can demand."

Bartlett v. Gates, 117 Fed. 71.

We respectfully submit that the interlocutory decree and order appointing receiver should both be affirmed.

Dated, San Francisco,
March 7, 1919.

Wm. F. Rose,
Solicitor for Appellees.

Charles Clyde Spicer,
Of Counsel.

(APPENDIX FOLLOWS.)

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Appendix.

ORAL OPINION (417).

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

Hon. Wm. C. Van Fleet, Judge.

In Equity—No. 196.

W. S. Overton et al.,
Plaintiffs,
vs.
Presidio Mining Company et al.,
Defendants.

Monday, December 3, 1917.

Wm. F. Rose, for Plaintiffs.

R. F. Harding, for Defendants.

The Court (orally): This, as counsel are aware, is quite a voluminous case and has taken considerable time for consideration. I had hoped that the situation would be such as to enable me to express my views in writing, but I find the business of the Court is such that it is hopeless for a very considerable length of time for the Court to expect to find any opportunity to attend to other than the disposition of the criminal business before it; and I have concluded that it is better that the Court announce its conclusions in a general way but with

sufficient definiteness for counsel in the case to understand them; for while the case is an important one and of great interest to the parties concerned, it is not one of general public concern.

I have taken occasion to carefully review the evidence in the case in its entirely and likewise I have very carefully considered the oral argument, the briefs and the authorities. I find in going over the evidence that I took occasion during the trial, as I frequently do, to express my views quite freely and pointedly as to the impressions made by different features of the evidence upon my mind and therefore I need not go into any general repetition or recital of the evidence. My conclusions, arrived at reluctantly because of the fact that they involve a finding of fraud upon the part of the defendants, have been definitely reached, however, in favor of the plaintiffs' case. I need not, as I say, go into any general history of the controversy, but I am quite satisfied from the evidence that the original acquisition of control of this company by the defendants was through a fraudulent manipulation of the Osborne stock. The Osborne shortage, I am satisfied, came to the knowledge of the defendant William S. Noyes as early as December, 1912; that he took advantage of it to secure from Osborne that stock without any real compensation whatsoever; and that it was by the use of funds which belonged to the company but in a manner that never resulted in the shortage being made good to the company. Of course, as a book transaction it appeared to be, but

in reality it was not. I need not recite the various circumstances which culminated in the control of this corporation coming absolutely within the hands of William S. Noyes; it was by a series of transactions which to my mind led to but one result, and that is the conclusion that it was not a just and fair transaction.

The main matter for consideration in the case—the acquisition in the name of William S. Noyes of section 5—was enabled to be had by virtue of his getting control of the company and its board of directors; and I find that while the transaction was not carried out in that form, it was nevertheless an acquisition of that property by funds of this company in fact; that Noyes alone, aside from his superintendent, Gleim, was, of all the people connected with the company, fully cognizant of the character of section 5 and its value; that while he manipulated the securing of the control of that section and its eventual transfer to his name by means which might upon their face bear the impress of having been procured by funds other than those of the company, nevertheless he knew at the time that he had potential control of this company and that he could procure the means or funds from the company with which to pay for this land; and that he pursued a course which brought that result about. The incidental transaction referred to as the bonus resolution was with that object in view; first, to secure the means by which to manipulate the control of the Osborne stock, and, second, the passing of that reso-

lution also brought about a situation which enabled him to secure the funds of the company; that and the subsequent leasing of section 5 to the corporation defendant enabled him to procure the means with which to pay every cent of the consideration paid for section 5.

Under these circumstances I am satisfied that equity, which looks to the substance and ignores the mere form in which a transaction is cast, will hold that property to be in equity the property of the Presidio Mining Company.

The entire transaction, from start to finish, after Noyes got control of the offairs of this company by getting a board of directors which was absolutely under his domination, shows to my mind a uniform and persistent manipulation of its affairs in fraud of the rights of its minority stockholders and in fact in fraud of the rights of all excepting those who were in the transaction with Mr. Noyes; and I regret very much to have to find that the real nature of these transactions was such as to show a uniform and persistent course of fraudulent manipulation of the affairs of this corporation such as really redounded solely to the interest of William S. Noyes—aside from the incidental benefit that some of his board of directors secured through increases in their salaries and the benefit which resulted to his brother in securing to him certain of the Osborne and Willis stock, and was in its entirety inequitable and in my judgment cannot be permitted to prevail; that the defendant must be called upon to account for it. And

incidentally thereto I find that he must account also for various transactions outside of that main feature of his wrong. They are not sufficiently explained to remove the *onus* from one in control of the affairs of a corporation of this kind and occupying, as I hold, a fiduciary relation to it. He has not sufficiently explained his securing of benefits through other sources. I think that he must account for all benefit which he received from the company and the manner in which he received it, particularly from his arrangement with Benton Bowers, and likewise for his transactions with Gleim & Company. The tramway transaction in particular, I think, has a peculiarly shady appearance. The arrangement by which Gleim & Company, ostensibly at least, received the consideration that they did from this company through that tramway transaction is one that I do not think, without full explanation, can meet with the approval of a court of equity; and likewise the transaction and methods by which Noyes secured payments to himself from Gleim & Company in the collection of their bills against the company and its men. All those transactions, I feel, should be thoroughly searched out, because the rule is fundamental that one occupying a trust relation, which, as I say, I think the evidence fully establishes that Noyes did to this corporation, does not admit of this sort of dealing.

I propose, moreover, because I feel that it is warranted by the law, taking the administration of this corporation out of the hands of Mr. Noyes, for that

it is absolutely in his control, although ostensibly in the hands of the board of directors, I am left with no doubt. I propose to appoint a receiver for this corporation and to try and see if the interests of these stockholders cannot be subserved by a different administration of the property, which I believe is demonstrated by the evidence to be of great value; that is, it was of great value at least at the time the control was secured by Noyes, because the income which has been dissipated in one way and another so as never to reach the stockholders has been such as to show great value in the property; and I shall direct the plaintiff to draw a decree covering the various conclusions that I have indicated and requiring the defendant Noyes and the other defendants as well to account for what I regard as ill-gotten gains and as a result of fraud.

There is another consideration which I think should be included in the accounting. I am satisfied under the evidence that the large increases of the salaries of these officers, under the circumstances which the evidence discloses, were not honest; that the siuation did not call for such increases and, having been made under circumstances where they must be explained, they must be accounted for, and unless they can be explained. the officers will have to account for the excess that has been added to their salaries by the various raises that have been shown. This so-called bonus resolution, I think, was as bald a fraud as has ever fallen under my observation. It was without any character of fundamental right

in its inception; and, of course, the finding being that the title to this section 5 should really be in this corporation, all the benefits that accrued to Mr. William S. Noyes from that transaction, as well as the subsequent lease which I hold likewise to be void, must be accounted for. I think that is all that it is necessary for me to go into. Counsel are thoroughly familiar with the case and as I suggested a recital of the details is not essential.

Mr. Harding. Do I understand, your Honor, that the decree which your Honor directs will be an interlocutory decree?

The Court. Oh, yes, it will have to be. The case will be referred to a master for the purpose of taking an accounting, and of course, the appointment of a receiver is separate and distinct. I hold. as I say, that the circumstances are such as to authorize the appointment of a receiver for this property, and I will receive from the parties, if they wish to submit them, the names of qualified persons; if they can agree upon somebody to act as a receiver, well and good. I have no definite knowledge of the character and capacity of person that would be called for in such a place, but I would like to see the affairs managed with such intelligence, forethought and frugality that would bring something for the stockholders, and I believe it can be done.

[Endorsed]: Filed Feby. 12, 1918. Walter B. Maling, Clerk.

SYNOPSIS OF PLEADINGS, ALLEGATIONS AND ANSWERS AS TO PRINCIPAL ELEMENTS OF FRAUD CHARGED BOTH GENERALLY AND SPECIFICALLY AS AFFECTING ACQUISITION SEC. 5. OSBORN STOCK—CONTROL OF CORPORATION; ALSO AS TO JURISDICTION AND QUESTION OF LACHES.

Fraud Generally.

Amended Complaint.	Ans. WSN.
WSN dominates maj. stock, which dominates and controls PMC. Par. XI, 45.	Deny. Par. XI, 165.
Defdt. directors conspired to defraud company and in violation of duties passed following resolutions: S. H. lease Jan. 25. WSN and LMD elected directors. $45,000 bonus. Par. XII, 47.	Deny fraud, admits resolutions. Par. XII, 167, 168.
Directors fraudulently voted bonus. Par. XIV, 59.	Deny. Par. XIV, 183.
Directors conspired fraudulently to pay WSN and deceived minority. Par. XIV, 62.	Deny. Idem, 186, 187.
Directors under control of WSN, his tools, violated duties, untrue to trust, all transactions mentioned are fraud on stockholders. Idem, 65, 66.	Deny. Idem, 190.
Salaries exorbitant, paid to defdts. for assistance in defrauding company. Idem, 66, 67.	Deny. Idem, 191.
WSN profited from various firms in Shafter for years past. Idem 68.	Admit, but disposed of about 3 years ago. Idem, 193.
Practical operation of Nov. lease fraud on stockhld. Idem 67.	Deny. Idem, 192.

Fraudulent mismanagement and misapp. of funds. Par. XV. 72.	Deny. Idem, 198.
Compl. deceived by annual reports and letters WSN. Par. XVII, 74.	Deny. Par. XVII, 199.
Documents removed or destroyed. Idem, 74.	Deny. Idem, 199.
Directs. withheld inform. of contracts, concealed true conditions, defrauded corp. Par. XVIII, 76.	Deny. Par. XVIII, 201.
Corp. defrauded out of Sec. 5 and upwards of $150,000. Par. XX, 77.	Deny. Par. XX, 202.
SUPPLEMENTAL BILL.	ANS. WSN.
Acquisition of Sec. 5 a fraud on stockhlds. Par. VII, 233.	Deny. Par. VII, 253.
Beneficiaries other than minority. Par. XI, 236.	Deny. Idem, 258.

Acquisition Section 5.

WSN owner Sec. 5 from middle of Dec., 1912, and record owner since May 26, 1912. Amd. Comp., Par. VII, 43.	Admit, with averment that WSN was owner of Sec. 5 to May only by virtue of owning cap. stock of SHM. Ans. WSN, Amd. Com., Par. VII, 161.
WSN secured optionSHMCO in Dec., 1912. Amd. Comp. Par. XII, 46.	Admit, Ans. WSN, Amd. Comp., Par. XII, 165, 166.
Bonus resolution. Idem, 48.	Admit. Idem, 167.
Pd. WSN to Oct. 14, 1913, $24,-500 and $2003.60 in royalties. Idem, 48.	Admit payment. Idem, 168.
Dec., 1912, WSN obtained option on Sec. 5 and became real owner. Amd. Comp., Par. XIV, 57.	Admit in Nov., 1912, all but 4 shares. Ans. WSN, Amd. Comp., Par. XIV, 180, 181.

Price $20,000. Idem, 57.	Deny, aver $26,000. Idem, 181.
WSN knew value Sec. 5. Idem, 58.	Deny. Idem, 181.
Directors fraudulently voted bonus. Idem, 59.	Deny. Idem, 183.
Directors knew Sec. 5 belonged to WSN. Idem, 59.	Admit. Idem, 183, 184.
WSN expenses to Texas to get stock paid by PMC $433.55. Idem, 59.	Deny. Idem, 184.
Surv. and samp. done by PMC. Idem, 60.	Admit. Idem, 184.
PMC paid WSN $24,500 on bonus in 1913. Idem, 60, 61.	Admit. Idem, 185.
PMC paid WSN $2003.60 on royalties in 1913. Idem, 61.	Admit. Idem, 185.
Funds used to purchase Sec. 5. Idem, 61.	Deny. Idem, 185, 186. (struck out, amended)
Directors conspired fraudulently to pay WSN and deceived minority. Idem, 62.	Deny. Idem, 186, 187.
Jan. lease cancelled Nov. 19, 1913. Idem, 64.	Admit. Idem, 189.
Directors authorize new lease. Idem, 65.	Admit. Idem, 190.
Practical operation of lease fraud on stockhld. Idem, 67.	Deny. Idem, 192.
PMC equitable owner of Sec. 5 and net profits. Par. XVI, Amd. Comp., 73.	Deny. WSN Ans., Amd. Comp., Par. XVI, 198, 199.
PMC in law and equity entitled to have transferred title to Sec. 5. Idem, 73.	Deny. Idem, 198.
Noyes trustee, all defdts. trustees for benefits from Sec. 5, direct or indirect. Idem, 73, 74.	Deny, aver none but WSN recd. benefits, except from profits to PMC. Idem, 199.

SUPPLEMENTAL COMPLAINT.	ANSWER WSN SUPP. COMP.
In latter part of 1912 WSN secured option on all but 4 shares SHMC. Supp. Bill. Par. II, 227.	Admit. Ans. WSN Supp Comp., 242.
Before paying for stock, went into mine with EMG and learned that 10,000 or 20,000 tons of rich ore worth over $100,000. Idem, 227.	Admit. Idem, 242.
WSN then borrowed money to pay for stock, $10,000 from bank (PMCo stock as security), $10,000 from Bowers, and note for $5000 to H. Young. Idem, 227.	Denies. Before obtaining option arranged for loan. Admits gave PMC stock to Marfa Bk. as security for $10,000 loan. Pd. H. Young $5,000 and gave his note for $5,000. Idem, 242.
Bowers sells supplies to PMC. Idem, 227.	Admit. Idem, 243.
WSN then made lease of Jan. 25, 1913, with PMC. Idem, 227, 228.	Admit, but deny that lease was made immed. on securing SHM stock. Idem, 243.
WSN prevented PMC from buying Sec. 5 through control of maj. stock and bidable board, and drawing all surplus funds. Par. VII, 233.	Deny. Par. VII, 253.
Acq. Sec. 5 fraud on stockhld. Idem, 233.	Deny. Idem, 253.
WSN recd. $63,336.60 and claims over $49,000. Par. XI, 236.	Admit. Par. XI, 258.

Control of Osborn Stock.

ALLEGATIONS.	ANSWERS.
Amended Complaint.	
LO transferred 28,607 shares PMC stock to WSN Dec. 12, 1912. Par. XII, Amd. Comp., 46.	Admit. Ans. WSN, Amd. Comp., Par. XII, 166.

Deft. directs. passed following resolutions: SH lease Jan. 29. WSN and LMD elected directors. $45,000 bonus. Par. XII, Amd. Comp., 47.	Admit. Idem, 167.
BSN elected pres. and dir. WSN and LMD elected dircts. Par. XIII, Amd. Comp., 49.	Admit. Ans. WSN, Amd. Comp., Par. XIII, 169, 170.

Supplemental Bill.

WSN took advantage of shortage of LO, and concealed same by $11,000 from treasury of company, per bonus resolu. Supp. Bill, Par. III, 228.	Deny. Ans. WSN, Supp. Comp., Par. III, 243.
Minutes Jan. 29, 1913, false. Supp. Bill, Par. IV, 228.	Deny. Ans. WSN, Supp. Comp., Par. IV, 244.
WSN owner of nearly all SHMC concealed from dircts. G&H. Supp. Bill, Par. IV, 228.	Deny, no occasion to conceal or disclose. Idem, 245.
G&H not informed of Osborn shortage. Idem, 229.	Unable to answer. Idem, 245.
Shortage known to Peat and WSN and BSN. Idem, 229.	Admit as to himself and BSN, unknown as to Peat. Idem, 245.
G & H resigned on request. Idem, 229.	Admit, inf. & belief. Idem, 245.
WSN & LMD elected directs. Idem, 229.	Admit. Idem, 246.
Feb. 15, bonus resol. Idem, 230, Par. V.	Admit. Idem, 247, Par. V.
PMC paid WSN $11,000 in two checks in Feb. Idem, 230.	Admit. Idem, 247.
WSN deposited to his own credit. Idem, 230.	Admit. Idem, 247.
Gave LO his checks. Idem, 230.	Admit. Idem, 247, 248.
LO cashed said chks. and deposited to credit PMC. No entry in books. Idem, 230.	Admit, but entry made of payment to WSN. Idem, 248.

Directors all knew and acquiesced. Idem, 230.	Admit. Idem, 248.
WSN took 1 day note of LO Feb. 21, 1913, for $10,689.75 secured by $25,000 stock. Idem, 230, 231.	Admit. Idem, 249.
Still has such stock. Idem, 231.	Admit. Idem, 249.
Dircts. consented to continuance in office of LO at $300. Idem, 231.	Admit, aver BSN made dir. & pres. to supervise financial affairs and guard company. Idem, 249.
These facts concealed from stockholders. Idem, 231.	Denies concealment for other purpose than to prevent scandal and injury to corp. Idem, 249, 250.
BSN received from LO and LMD 10,926$\frac{5}{6}$ sh. stock without paying anything. Idem, 231.	Deny. Stock consideration for services rendered and to be rendered to PMC. Idem, 250.
WSO kept in ignorance. Supp. Comp., Par. X, 235.	Deny. Ans. WSN Supp. Comp., Par. X, 256.
Withheld information of LO shortage. Idem, 235.	Admit. Idem, 256.
In Oct., 1915, officers admitted shortage. Idem, 235.	Admit. Idem, 256.

Control of P. M. Co.

Amended Complaint.	Ans. WSN.
WSN. dominates maj. stock, which dominates and controls PMC. Par. XI, 45.	Deny. Par. XI, 165.
Personnel of board of dircts., Oct. 7, 1912. Par. XII, 45, 46.	Admit. Par. XII, 165.
Jan. 29, BSN elected pres. and dir. Jan. 31, WSN and LMD elected directors, WSN vp. and gm. Par. XIII, 49.	Admit. Par. XIII, 169, 170.

Directors, under control of WSN, his tools, violated duties, untrue to trust. Par. XIV, 65,66.	Deny. Par. XIV, 190.
Salaries exorbitant, paid to defdts. for assistance in defrauding company. Idem, 66, 67.	Deny. Idem, 191.
Fraudulent mismanagement and misapp. of funds. Par. XV, 72.	Deny. Par. XV, 198.
Majority control directly liable to minority. Par. XVI, 74.	Deny. Par. XVI, 199.
Compl. deceived by annual reports and letters WSN. Par. XVII, 74.	Deny. Par. XVII, 199.
Directors withheld information of contracts, etc., concealed true conditions, defrauded corporation. Par. XVIII, 76.	Deny. Par. XVIII, 201.

Supplemental Bill.	Ans. WSN.
Minutes Jan. 29, 1913, false. Par. IV, 228.	Deny. Par. IV, 244.
WSN owner of nearly all SHM concealed from directors G & H. Par. IV, 228.	Deny, no occasion to conceal or disclose. Idem, 245.
G & H not informed of Osborn shortage. Idem, 229.	Unable to answer. Idem, 245.
Shortage known to Peat and WSN and BSN. Idem, 229.	Admit as to himself and BSN, unknown as to Peat. Idem, 245.
G & H resigned on request. Idem, 229.	Admit, infor. and belief. Idem, 245.
WSN & LMD elect. drcts. Idem, 229.	Admit. Idem 246.
WSN had secured control of Sec. 5. Idem, 229.	Admit. Idem, 247.
And also PMC. Idem, 230.	Deny. Idem, 247.

Voting Trust controlled by WSN. Par. VI, 232, 233.	Admit trust, but deny control by WSN, Par. VI, 252, 253.
Controlling stock in hands of WSN and his subordinates. Par. XI, 237.	Deny, admit control in present board of dir. and that it will probably remain in their hands. Par. XI, 259.

Jurisdiction.

Amended Complaint.	Ans. WSN.
Residence compl. Kansas and Maryland. Par. I, 40, 41.	Deny, lack of inform. Par. I, 158.
Corp. exist. Cal & Tex. Par. II, 41.	Admit. Par. II, 158.
Residence defdt. drcts. in Cal. Par. III, 41.	Admit. Par. III, 158, 159.
Compl. stockholders. Par. IV, 42.	Admit. Par. IV, 159.

Laches.

Amended Complaint.	Ans. WSN.
Directors conspired fraudulently to pay WSN and deceived minority. Par. XIV, 62.	Deny. Par. XIV, 186, 187.
Compl. not aware of acts, not consented, not guilty of laches. Par. XIV, 71.	Deny, aver laches. Par. XIV, 195, 196.
Compl. first discovered in April, 1915. Par. XVII, 74.	No knowledge. Par. XVII, 199.
Compl. deceived by annual reports and letters WSN. Par. XVII, 74.	Deny. Par. XVII, 199.
Documents removed or destr. Par. XVII, 74.	Deny. Par. XVII, 199.
Dircts. withheld inform. of contracts, concealed true conditions, defrauded corp. Par. XVIII, 76.	Deny. Par. XVIII, 201.

Supplemental Bill.	Ans. WSN.
Lack of knowledge of plaintiffs, residence out of state. Par. X, 234, 235.	No information. Par. X, 255, 256.
WSO kept in ignorance. Idem, 235.	Deny. Idem, 256.
Withheld information of LO shortage. Idem, 235.	Admit. Idem, 256.

Amended Prayer.

Vol. I page	Par.	
285	1	Injunction to prevent defts. continuing acts complained of or of carrying on business P. M. Co.
286	2	Leases, bonuses, contracts to be declared null and void.
	3	Salaries cut off; no further moneys paid on Sec. 5 account.
	4	Defts. be removed from office.
	5	That defts. be restrained from selling their stock but that it be deposited with Clerk of Court.
287	6	Defts. return their salaries to company. W. S. Noyes return excess of $200 paid Gleim.
	7	Defts. be held as trustees for benefits received.
	8	Defts. be compelled to make restitution to P. M. Co. and its minority stockholders for amounts ascertained to be due.
	9	That profits obtained by defts. other than W. S. Noyes if invested in other enterprises be declared to be in trust for P. M. Co. and accounting required.
288	10	That W. S. Noyes be restrained from transferring Sec. 5 or from collecting further moneys on Sec. 5 account.
	11	That W. S. Noyes be declared to be a trustee of Sec. 5 and profits made by him other than from his salary. Noyes has legal title to Sec. 5, P. M. Co. equitable title.
	12	That he transfer Sec. 5 to P. M. Co. on proper terms.

289 13 Profits invested by W. S. Noyes in other enterprises be accounted for.

14 Capital stock deposited with Clerk be transferred to P. M. Co. to liquidate defts. indebtedness to corporation.

15 Defts. property be subjected to lien for benefit of corp. and minority stockholders.

16 That accounting be had from defts. to corporation and minority stockholders.

17 That complainants have judgment for their costs and expenses of suit, with counsel fees. That said sums be declared a first lien on property and assets of corporation, including Sec. 5.

290 18 That receiver be appointed to take charge and if necessary wind up corporation.

19 Other relief requisite.

INTERLOCUTORY DECREE (SYNOPSIS OF)

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Page

424 All defts. other than P. M. Co. guilty of fraud upon it since Dec., 1912, in conducting its

425 affairs; participated in a conspiracy with W. S. Noyes to and did control and defraud said corporation.

424 W. S. Noyes illegally obtained benefits while in fiduciary relation;

Osborn illegally misappropriated Co. funds.

425 Leases, bonuses and contracts relative to Sec. 5, including contract Jan. 25, 1913, bonus resolution Feb. 15, 1913. Contract Nov. 19, 1913, resolution giving W. S. Noyes control over operatives, resolutions relative to salaries and increases and payments made, tramway contracts —illegal and fraudulent and void.

428 This is general finding of fraud within the issues.

DETAILS.

426 Sec. 5 illegally acquired by W. S. Noyes while in fiduciary relation; title belongs to Co. subject to payment of its purchase price; profits derived

427 therefrom by Noyes illegally and fraudulently obtained; all claims of W. S. Noyes on Sec. 5 account cancelled. Stock transactions since Dec., 1912, voting trust, bonus resolution and the Feb. 21, 1913, $10,689.75 note transaction, held part of collusive plan to illegally manipulate, control, corp. by W. S. N. through
428 his biddable Board of Directors, and are a fraud on corporation.

431 Stock transferred from Osborn put in escrow with Clerk, with promissory note; injunction kept in force.

428 Increases in salary of defendants and E. M. Gleim illegal.

428 Injunction kept in force preventing W. S. Noyes drawing moneys from Co. treasury or Sec. 5
429 account, or transferring or encumbering said property. Decrees him to transfer Sec. 5 within 30 days after final decree entered, then give full discharge of all claims against Co. on Sec. 5 account.

431 Noyes account for moneys received Sec. 5 account.

431 Noyes account for moneys received from third parties, prior to Jan. 1, 1913, back to Sept. 14, 1908—found fraudulent (p. 424). Master to
429 report nature of these transactions.

430 Salaries to be reported; Master to find reasonable or unreasonable.

432 W. S. Noyes credited with purchase price Sec. 5.

424 Osborn moneys misappropriated.

433 That he account for same. .

433 Master to report increases in salaries, directors fees, travelling expenses, production of books and records, etc. before Master.

434 Allowance of recovery for company's benefit.

434 Accounting ordered as to costs and expenses, and allowance deferred.

434 Court retains jurisdiction over parties.

Schedule 15.

PRESIDIO MINING COMPANY.

STATEMENTS OF ASSETS AND LIABILITIES—NOVEMBER 30, 1912, TO FEBRUARY 28, 1913.

ASSETS.	1912 November 30.	1912 December 31.	1913 January 31.	1913 February
CURRENT:				
Cash in Bank.................	8380.91	3303.72	258.94	6961
Bullion in Transit............	10605.03	17523.66	14344.16	22521
	18985.94	14219.94	14603.10	29483
SUPPLY INVENTORIES:				
Mill Supplies	19314.71	20819.30	19054.53	18293
Mine Supplies	1079.41	710.89	1039.79	1030
Fuel Oil	2060.52	2018.21	1696.26	2719
Fuel Wood	297.51	435.04	230.01	1288
	22752.15	23983.44	22020.59	23332
MISCELLANEOUS.				
Cyanide Plant Installation....		100.90	1078.34	5132
Mining Lease				45000
Section No. 5................			124.30	124
Drafts	450.00	900.00	900.00	
L. Osborn	10689.75	10689.75	10689.75	
	11139.75	11690.65	12792.39	50256
Total Assets	52877.84	49894.03	49416.08	103072
LIABILITIES:				
CURRENT:				
W. S. Noyes—Balance of $45000 Resolution				34000
Mine Cash Overdraft and Unpaid Invoices	11612.44	1681.92	3581.93	14224
Total Liabilities	11612.44	1681.92	3581.93	48224
NET WORTH	41265.40	48212.11	45834.15	54848
TOTAL	52877.84	49894.03	49416.08	103072

NOTES:

Mining and Milling Property are not included in the Assets. Cyanide installation and Mining Lease only appeared on the books. Bullion in transit includes the shipment taken into account as applicable to the current months; operations; although sometimes forwarded as late as the 22d of the following month.

In figuring the available cash on February 28, 1913, the item "L. Osborn $5689.75" was considered as a cash asset in view of the fact that $5000 had already been paid and the balance $5689.75 was deposited in the Bank on March 1, 1913.

CONDENSED STATEMENT OF OPERATIONS:	Total.	December.	January.	Februa
Sales of Bullion	62757.53	22932.69	14344.16	25480
Mining Expenses	14613.95	5185.47	4845.74	4582
Hauling Ore	4461.99	1637.86	1358.90	1465
Milling Expense	24118.54	7555.41	8361.77	8201
Other Expenses	5980.38	1607.24	2155.71	2217
	49174.86	15985.98	16722.12	16466

50 CENT ROYALTY LEASE.

Minute Book, pp. 28-29 (855).

CONTRACT OF LEASE.

This Agreement made and entered into the 25th day of January, A. D. 1913, by and between The Silver Hill Mill and Mining Company, a corporation duly incorporated and organized under the laws of the State of Texas, party of the first part, and the Presidio Mining Company, a corporation duly incorporated and organized under the laws of the State of California and authorized to carry on its business in the State of Texas, party of the second part,

WITNESSETH:

that the party of the first part hereby leases to the party of the second part for the term of one year from date hereof, the following described tract of land, to wit, Survey Number Five (5) in Block Number Eight (8) said survey made for the Houston and Texas Central Railway Company, which said survey is situated in the County of Presidio, State of Texas, and hereby grants to the party of the second part for the term aforesaid, the right to enter upon, hold and possess said land for the purpose of working, mining and extracting silver bearing ores and other minerals that may be found thereon.

The party of the second part, in consideration of the premises, hereby covenants and agrees upon the execution of this contract to enter at once upon

said land for the purpose of working and extracting therefrom all silver bearing ores and other minerals that may be found therein, and covenants and agrees to pay to the party of the first part 50/100 Dollars per ton for all ores that may be taken out of said mine, the amount to be ascertained by weighing said ores and where this method shall be impracticable, then, the amount shall be determined by measurement.

It is further agreed that the said party of the second part shall monthly render to the party of the first part a true and exact account of all ores extracted from said mine and within ten days after said monthly account is rendered shall pay to the party of the first part the amount due to it for the month for which said account is rendered.

It is further agreed that this lease shall terminate on thirty days notice given in writing from either party to the other party to this contract.

In testimony whereof, the party of the first part has caused these presents to be signed by its President and countersigned by its Secretary, with its corporate seal to be hereunto affixed, pursuant to an order of its Board of Directors, and the party of the second part has caused these presents to be signed by its President and countersigned by its Secretary with its corporate seal to be hereunto affixed.

Seal
Silver Hill Mill and Mining Company. W. H. Cleveland, President.
T. R. Russell, Secretary.

Seal
Presidio Mining Company John W. F. Peat, President.
L. Osborn, Secretary.

$45,000 BONUS RESOLUTION * (860).

Minute Book, pp. 32-33.

Whereas, at the request of this corporation, Wm. S. Noyes has expended large sums of money and has rendered valuable services to this corporation outside the line of his employment in negotiating and securing for this corporation that certain lease from the Silver Hill Mill and Mining Company to this corporation dated January 25th, 1913, and set forth in these minutes on pages 28, 29 & 30, and will render further valuable services to this corporation by securing to this corporation a continuation of said lease, thereby securing large profits to this corporation, be it therefore Resolved that this corporation do pay said Wm. S. Noyes, as compensation for said services heretofore rendered and hereafter to be rendered, the sum of forty-five thousand dollars ($45,000.) in manner following, to wit: Eleven thousand dollars ($11,000.) forthwith, the further sum of ten thousand dollars ($10,000.) ninety days from this date the further sum of twelve thousand dollars ($12,000.) five months from date, and the further sum of twelve thousand dollars ($12,000.) six months from date, Provided that if the earnings of this corporation shall not be sufficient to make said deferred payments at the respective times above provided, then said deferred payments shall be made to said Noyes as fast as the earnings of this company will permit. The President and Secretary are hereby authorized

* See November 19, 1913, contract page....Appendix where appellants call this a $45,000 "Bonus" to Wm. S. Noyes.

and directed to make the payments herein provided and to take receipts therefor as made.

NOVEMBER 19, 1913, LEASE (873).

Minute Book, pp. 40-43.

Whereas, this corporation made and entered into a contract of lease with the Silver Hill Mill and Mining Company bearing date the 25th day of January, 1913, and set forth in these minutes on pages 28-30, and Whereas, by resolution adopted on the 15th day of February, 1913, and set forth in these minutes pages 32-33, this Board resolved to pay W. S. Noyes the sum of Forty-five Thousand (45,000.) Dollars in the manner therein specified, as a bonus or compensation for procuring said lease; and Whereas it was the intention of this Board that by the arrangements above recited this corporation should make a large profit from the ores to be taken by it from the mine of said Silver Hill Mill and Mining Company, and that from such profit, and not from its other resources, this corporation should pay said bonus or compensation to said Noyes; and Whereas said Noyes offered to this corporation the opportunity to purchase said Silver Hill Mine at the cost thereof but this Company was unable to purchase the same and declined to do so because of its financial inability, and in order to secure to this Company the opportunity to make a profit from said mine the said Noyes

thereafter purchased the entire capital stock of said Silver Hill Mill and Mining Company and has caused said corporation to be dissolved and the said mine to be conveyed to him, but said Noyes declines to continue said lease for the reason that the profit made by this Company out of ores taken from said mine up to this date has been unduly large and unfair to said Noyes and he now offers to enter into the lease set forth below.

Be it therefore Resolved, That the President and Secretary of this Corporation be and they are hereby authorized and directed on behalf of and as the act and deed of this corporation, to enter into and execute a contract with said W. S. Noyes in the words and figures following, viz:

"This Agreement, made and entered into the 19th day of November, 1913, by and between William S. Noyes, the party of the first part, and the Presidio Mining Company, a corporation duly incorporated and organized under the laws of the State of California, and authorized to carry on this business in the State of Texas, the party of the second part:

Witnesseth: That the party of the first part hereby leases to the party of the second part for the term of one year from date hereof the following described tract of land, to wit: Survey Number Five (5) in Block Number Eight (8), said Survey made for the Houston and Texas Central Railway Company, which said Survey is situated in the County of Presidio, State of Texas, and hereby

grants to the party of the second part for the term aforesaid the right to enter upon, hold and possess said land for the purpose of working, mining and extracting silver bearing ores and other minerals that may be found thereon.

The party of the second part, in consideration of the premises, hereby covenants and agrees upon the execution of this contract to enter at once upon said land for the purpose of working and extracting therefrom all silver bearing ores and other minerals that may be found therein and covenants and agrees to pay to the party of the first part one-half the net value of any and all ores that have been or may be taken from said mine by said party of the second part and reduced in its mill; said net value to be determined as follows, to wit:

A record shall be kept of the number of tons of ore taken by party of the second part from said mine and the average assays thereof in the stopes from which it is taken; a similar record shall be kept of the ores taken by said party of the second part during the same period from its own mine and from the two records so obtained and kept the average stope assays of all the ore milled from both said mines for a given period shall be deduced. After said ore shall have been milled, the average extraction in fine ounces of silver shall be ascertained and the percentage of the average stope assays actually extracted shall be calculated and determined and the gross value of its ore taken during such period from said Silver Hill Mine shall

be deemed to be the average stope assay multiplied by said percentage of extraction. From such gross value, the actual cost of mining and milling, less the sum of $1.00 per ton for the smaller cost of mining in said Silver Hill Mine as compared with the mine of party of the second part, shall be deducted and the difference shall constitute the net value of the ores so taken during that period by party of the second part from said Silver Hill Mine. Freight, expressage, insurance and refinery charges upon the bullion obtained from all such ores shall be treated as a part of the cost of reduction.

And in view of the large profit already made by said party of the second part from ores heretofore taken from said Silver Hill Mine, it is agreed that such sums as have been paid to the party of the first part under and by virtue of that certain resolution of the Board of Directors of party of the second part on the 15th day of February, 1913, and all royalties heretofore paid on account of said lease from said Silver Hill Mill and Mining Company shall be retained by the parties to whom they have been paid and shall be treated as a payment to party of the first part on account of the proportion of net profit from said mine hereby agreed to be paid by party of the second part, it being the true intent hereof that an equal division of the net profit herein specified will constitute a fair and just price to be paid to said party of the first part for the ore so bought from him, said party of the first part furnishing the ore and the party of the

second part reducing the same without the investment of any capital.

It is further agreed that the party of the second part shall monthly render to the party of the first part a true and exact account of all ores extracted from said mine during the preceding calendar month and a statement of the profit derived therefrom, and within ten days after said account is rendered shall pay to the party of the first part the amount due to him under the provision hereof for the month for which said account is rendered.

It is further agreed that this lease shall terminate on thirty days' notice given in writing from either party to the other party to this contract.

It is further agreed that all ores that have been taken out of said mine by party of the second part shall be deemed to have been taken out under the provisions of this contract and shall be settled for by said party of the second part as herein provided, and that the contract of lease by and between the Silver Hill Mill and Mining Company and this corporation bearing date the 25th day of January, 1913, shall be, and the same is hereby, cancelled, annulled, abrogated and set aside.

It is further agreed that the provisions of this contract shall be binding upon and inure to the benefit of the successors and assigns of the respective parties hereto.

In testimony whereof, the party of the first part has hereunto signed his name, and the party of the

second part has caused these presents to be signed by its President and countersigned by its Secretary, with its corporate seal to be hereunto affixed.

WM. S. NOYES

PRESIDIO MINING COMPANY

(Seal) By B. S. Noyes, President.

By L. Osborn, Secretary.

BY-LAWS OF PRESIDIO MINING COMPANY.

ARTICLE IV.

Power of Directors.

The directors shall have power:

1st. To call special meetings of the Stockholders when they deem it necessary. And they shall call a meeting at any time, upon the written request of Stockholders holding one-third of all the capital stock.

2d. To appoint and remove, at pleasure, all officers, agents and employes of the Corporation, prescribe their duties, fix their compensation, and require from them security for faithful service.

3d. To conduct, manage and control the affairs and business of the Corporation, and to make rules and regulations, not inconsistent with the laws of the State of California or the By-Laws of the Corporation, for the guidance of the officers and management of the affairs of the Corporation.

4th. To incur indebtedness. The terms and amount of such indebtedness shall be entered on the minutes of the Board, and the note or obligation given for the same, signed officially by the President and Secretary, shall be binding on the Corporation.

MEETINGS OF BOARD OF DIRECTORS SINCE JANUARY 1, 1913, TO SEPTEMBER 23, 1915, SUMMARIZED FROM MINUTE BOOK (Tr. 854-890).

1913		Tr. page
Jan. 29.	50-cent royalty lease voted; to borrow $15,000; election of B. S. Noyes to the Board and as President; Peat appointed Asst. Secy.; authority to President and Secretary to sign notes, etc.	854
Jan. 31.	W. S. Noyes and L. M. Doherty elected Directors; W. S. Noyes appointed Vice-Pres. and Gen. Mgr. with no change in salary.	859
Feb. 15.	Bonus resolution; W. S. Noyes authorized to employ and remove superintendent and all other employes.	860
April 2.	President's salary raised from $25 to $150.	862
June 7.	Company to borrow money from Wells Fargo Nevada Natl. Bank.	863

Sep. 5.	President or Vice-Pres. and Secretary authorized to sign checks, drafts, etc., and President empowered to delegate this authority.	866
Oct. 6.	Annual Stockholders Meeting; amended By-Laws and elected directors; ratified previous acts of directors. Directors meeting elected officers.	868
Nov. 19.	50-cent royalty lease cancelled, and new lease made with W. S. Noyes.	872
1914		
Jan. 27.	Authorized borrowing $10,000 from W. S. Noyes at 8% per annum.	878
Mch. 10.	Authorized Deed—certain property to W. W. Bogel; voted Gregg & Gleim $9,000, commuted profit.	880
1915		
Feb. 23.	Annual Stckholders Meeting; elected directors. Directors Meeting; elected officers.	884
Sep. 23.	Resignation of Osborn; J. C. Doherty elected director; Peat appointed Secretary at $270 a month; conferred power to sign checks, drafts, etc., on President or Vice-President and Secretary, said power to be delegated by the President in his judgment.	888

DEFENDANTS' EXHIBIT C (642).

Feb. 26, 1916.

Captain W. S. Overton,
995 Pine St.,
San Francisco, Cal.

Sir:

I beg to acknowledge the receipt of your letter of Feb. 24th which reached me yesterday afternoon.

I agree with you entirely that it is your right as a stockholder to know the matters about which you inquire; but inasmuch as you have every particle of the information that is necessary to fully answer those inquiries, I do not understand how or why you need to ask the questions of anyone. Nevertheless, I will endeavor, to the best of my ability, to answer your questions fully and make the subject as clear to your comprehension as I can.

1. The profit from Section 5 is shown on the table attached to each voucher for Ore Purchases and the profit for any given period, say one year, is the aggregate for that period of the amounts thus shown.

2. The same vouchers for Ore Purchases show the amount credited to W. S. Noyes for ore purchases, as does also the ledger account so entitled. and a deduction of the aggregate amount so credited from the aggregate referred to in the preceding paragraph leaves the net operating profit to Presidio Mining Co. from Section 5 for that period.

3. The annual report shows clearly for any given year the gross income from all bullion, the total

operating expenses and the consequent operating profit. For periods of less than one year, those matters appear, of course, on the Company's books and vouchers.

4. A comparison of the net operating profit of the Presidio Mining Company from Section 5 (which is one-half of the net) with the Company's operating profit from both mines for the same period shows by the difference the profit or loss from Section 8.

Applying the foregoing to the year 1915, you would get the following results:

Total profit from Section 5 (aggregate of statements accompanying vouchers for ore purchases)	$71,686.40
Credit of Ore Purchases (obtainable from vouchers or from ledger account)	35,843.20
Operating profit to P. M. Company from Section 5 (½ net)	$35,843.20
Presidio Mining Company's operating profit from both sources (shown by annual report or obtainable from books before receipt of report)	$20,209.30
Operating loss on Section 8, obtained by difference	$15,633.90

Applying the same process to the fiscal year 1914 (covering the period from Sept. 1, 1913, to Dec. 31, 1914) you would obtain the following results:

Total operating profit obtained from Section 5 ascertained in the manner above indicated	$123,356.40

Less ore purchases as ascertained above	61,678.20
P. M. Company's operating profit from Section 5	$61,678.20
Operating profit of P. M. Co. from both sources (shown by annual report)	$46,055.06
Operating loss on Section 8, obtained by difference,	$15,623.14

And for the fiscal year 1913, the same process leads to the following results:

Operating profit from Section 5	$30,736.40
Less ore purchases	15,368.20
Making an operating profit of P. M. Co. from Section 5	$15,368.20
Net operating loss of P. M. Co. on both operations	3,543.71
Operating loss on Section 8, obtained by addition	$18,911.91

It is interesting to note that the decline in the price of silver more than accounts for the operating losses on Section 8 and the fact that had the price of silver remained stationary it, by these operations, would have produced a profit from both properties.

Trusting that I have made the subject perfectly clear, I am

Yours truly,

President.

COMPLAINANTS' EXHIBIT 20 (778).

(All letters in possession of any of us file in office Feby. 23.)*

995 Pine Street,
San Francisco, Cal.
February 15, 1916.

President, Presidio Mining Co.,
San Francisco, Cal.
Sir:—

This morning I was informed b the Secretary, Mr. Peat, on my request to have all correspondence of the company put in the company office, that the only letters from Mr. W. S. Noyes to Mrs. Willis are in evidence, that there are no letters between Mr. W. S. Noyes and Mr. E. M. Gleim, and that as Mr. Harding has all letters not on file from stockholders these can be had later.

There is one letter from Mr. W. S. Noyes to Mrs. Willis dated January 25, 1914, from which extracts were read in court, but the letter itself was not put in evidence (page 547, transcript). This letter states the operating profit for the previous four months, and also refers to certain payments made at that time.

te
swer

I request that this letter be placed in the company office, and also that the answers of Mrs. Willis to it and to any other letters referring to company business be also placed there.

In regard to the correspondence between Mr. W. S. Noyes and Mr. E. M. Gleim, there were copies of several letters in the office at Shafter in August, 1915, from which Captain Overton took extracts.

*This and the marginal notes in pencilled handwriting W. S. Noyes.

I quote a few below, and request that these letters, either retained copies or originals, be placed on file in the company office, as well as the other letters to which reference is made in these quotations, and those to which these are answers.

EXTRACTS, W. S. NOYES TO E. M. GLEIM.

April 10, 1913.

I am a little uneasy about where we will come out in the matter of available surplus because as yet we have no advice of any bullion shipment later than Bar 6054.

too old
not kept

April 21, 1913.

I will have Mr. Osborn send you $3000 more within a couple of days, or as soon as he gets more money from Selby's. I suppose much of the high disbursements so far are for construction.

"

June 6, 1913.

The company has today arranged to obtain a loan of $10,000 from the Wells Fargo Nevada National Bank, and consequently we will be well able to take care of our accounts as they come up; but nevertheless I wish you would telegraph me on receipt of this letter the amount of free cash you have applicable to June accounts, or after the close of May business, unless you receive a telegram that I am on the way south.

"

Sept. 4, 1913.

I would like very much if you will see Harry Young and ask him to try to find and send me the tax bill on Sec. 5 for 1912; the Silver Hill Company's books show it to have been paid, but the receipted tax bill is not with the vouchers.

November 3, 1913.

Your letter of Oct. 29th is just at hand.

* * * * * *

On Oct. 9th and on another occasion some time before that I wrote you that I would like an opinion from you as to the extent of the No. 13 ore body. You know Clark estimated that at about 10,000 tons; it seemed to us that there was much more.

March 11, 1914.

Enclosed please find the new contract with Gregg & Gleim with one copy properly executed upon the part of the company. Fill into both copies the date of the original contract in the space left blank for the same, and after obtaining the signature of Gregg & Gleim return the uncovered copy to L. Osborn, Secretary.

April 2, 1914.

I have not seen Arthur Painter since I have been back here nor heard of him except when ordering repairs you have made a requisition for. I am of the opinion that he is studiously keeping away from me, for he cannot but be aware of the comparative fizzle they have made in building the tramway, in respect of the cost of installation.

April 22, 1914.

In vouchering the $750 monthly payment to Gregg & Gleim account of the tramway, I would word it just about as expressed in the contract, i. e. one twelfth of the commuted profits on hauling ore and charge it to ore transportation.

no copy here

EXTRACTS, E. M. GLEIM TO W. S. NOYES,

Sept. 21, 1913.

Replying to your letter of the 17th the Ledger Account "Cyanide Installation" has been closed.

not kept too old

* * * * * *

My estimation of tonnage available in the Presidio Mine of, or above, a cyaniding grade is 300,000 tons.

My estimation of tonnage available in Sec. 5 of, or above, a cyaniding grade is 100,000 tons.

Oct. 2, 1913.

E. G. has taken up the matter of the $4000 note with Sullivan and considers that it is settled. I will explain to the proper persons the reason for the delay in the matter to which you referred.

not kept too old

Dec. 28, 1913.

I suggest that we pay Gregg & Gleim for the ore hauling which they are now doing by allowing the old rate to obtain after the tram starts until such time as we are paid up.

not kept

March 3, 1914.

Several amendments, any one of which was satisfactory to us, to the contract between Gregg and Gleim and the Company for the building and operation of the rope tramway; were proposed and submitted to us by Gregg & Gleim, with the idea of placing the entire control of the tramway in the Company's hands and thereby avoiding any conflict of authority in its operation or any division of liability in case of accident or for any other cause.

Aug. 10, 1914.

I wish I might get you to cut the expense of the s.s. for the next few months at least. It seems to me much in excess of anything that is necessary.

Jan. 30, 1915.

I went to Marfa yesterday to see about the note held by the Marfa National Bank. Mr. Fennell had just written you a letter which I enclose herewith.

March 29, 1915.

I will show Capt. Overton everything there is to see and answer any questions that he may ask. From what you say I take it that he has a bunch of the Mills stock and that you are pleased that he has.

April 26, 1915.

Referring to your letters from Mar. 26 to date:—Capt. Overton's Visit. * * *

Again requesting that all of the letters above referred to be placed on file in the company office as soon as possible.

Very truly yours,
CONSTANCE MILLS OVERTON.

DEFENDANTS' EXHIBIT B (Tr. 623).

The Montclair,
995 Pine Street,
San Francisco, Cal.
July 29, 1915.

Dear Mr. Gleim:

Well, you see I have struck and struck *hard.* I shall pursue these men to the end of the trail and shall live here the rest of my life if necessary.

I have telegraphed Mr. Stevens to ask the El Paso papers to say that I hold you in highest esteem—you are the only clean official in my opinion.

In going over the books I learn we pay some one $46 a month regularly from the S. F. office to spy on you. I asked Osborn who the spy was but he said "I don't know. Only Mr. Noyes knows who he is." So be *discreet.*

You will never have them over you again. I expect I shall have quite a little to do with it hereafter and with honest men in the mine will be a success. Bonuses will go in dividends.

I have told the S. F. reporters that I have only one thing to say beyond what they see in the complaint and that is Mr. E. M. Gleim is an honorable

and efficient official and is excluded in my complaint of the management.

I think better days are in store for you. Mrs. Overton liked you and your wife too. I have not written because I did not want these people here to jump on you as assisting me—which you did not.

I am glad I like you. I so hate those "bonus" men up here it is a relief to recall a clean efficient official. Of course, Noyes would insist on this too for he needed *all* the graft.

If I ever control the management here I pledge you my word I shall put no spy on you; I wouldn't insult a man so.

Please regard this note only as confidential. You can show the rest all you please. It is in the press now.

Anything you may say to me will be considered confidential but with your spy there it is best not to write me.

Hastily,
(Signed) W. S. Overton.

DEFENDANTS' EXHIBIT A (Tr. 621).

Shafter, Texas,
August 10, 1915.

Mr. E. M. Gleim,
Shafter, Texas.

Dear Sir:

1: You received a personal letter from me dated July 29, 1915, and marked by me "confidential."

2: Mr. W. S. Noyes, whom I am accusing of very serious charges in the courts telegraphed you in secret code as follows:

> "You will probably receive letter from plaintiff. Send by mail with envelope."

3: Mr. Noyes exceeded his rights in ordering you to send him a private letter. I am not an official of the corporation and Mr. Noyes presumed a great deal in issuing such an order, he did not even have the decency to put such a message in English but had to resort to a secret code. My present object in life is to turn the light and truth on Mr. Noyes' machinations; I do not expect to have to resort to his secret weapons.

4: On questioning by me you admit that you expect Mr. Noyes to call upon you for a report of my words, acts, etc. I must inform you that Mr. Noyes is a Director of the Presidio Mining Co. and that I have the legal right to have access to all communications from him to you on all matters (secret or otherwise) relating to the mine, the corporation or my suit against the directors. These are official messages and I demand as a stockholder that none of them be concealed or destroyed even if Mr. Noyes so orders. Any personal communication not bearing on the corporation, etc., is a different matter; but if the communication even touches on these matters they must be kept where I shall see them.

5: I have requested you to give me a copy of my "confidential" letter to you; also of the translation of the telegram referred to above.

6: When Mr. Noyes calls on you for what I did, etc., it may help you to send him a copy of this letter. I took many extracts from letters and records; I interrogated you closely on mine affairs; I discussed my complaint to you fully; I reminded you that I had arrived here unsuspicious of Mr. Noyes after my interview with him March 24, 1915, and that I had questioned you as to the method of keeping the record of Sec. 5 and that I told you then that I had been told that a record of cost was kept here at the mine by Mr. Noyes; I told you that Mr. Noyes had lied to me and my wife; and that I had a move in reserve that would stagger Mr. Noyes.

You answered my questions (all of which were proper) frankly and honestly; you told me you could not take sides and that as a soldier I could understand your attitude; you have made no reflection on anyone connected with the suit; you have dealt with facts as such without comment. If these facts were damaging to Mr. Noyes that is a conclusion I alone have made.

Very truly,

W. S. Overton,

Captain, U. S. Army (Retired).

DEFENDANTS' EXHIBIT IV (Wm. S. Noyes' Answer of August 13, 1915, to original Bill of Complaint).

Eastern Point, Gloucester, Mass.,

Oct. 1, 1913.

Dear Mr. Osborne:

Yesterday Mr. Lyons of Halsey & Co., read General Mills a letter from Mr. Noyes of the cyanide

plant you had installed and Mr. Noyes said you expected to net $50,000 a year now. This seems too good to be true and especially to me now as I am very hard up due to two children of my own and a widowed sister with two babies for me to take care of. This news has cheered me up wonderfully. I hope you can confirm these hopeful expectations. I cannot wait for the Annual Report.

Was the plant put in from earnings? If so *"Hurrah"!*

Please write me all about it. Miss Kline to whom General Mills gave some of his stock is in the house and almost as excited as I am over the good news.

Very truly,

W. S. Overton.

Gen. Mills is hale and hearty and so is Mrs. Mills.

Please address No. 2 Dupont Circle, Washington, D. C.

DEFENDANTS' EXHIBIT I (Tr. 668).

General Anson Mills, U. S. Army (retired)
No. 2, Dupont Circle, Washington, D. C.

April 26, 1907.

Mr. John F. Boyd,
President, Presidio Mining Company,
216 Powell Street, San Francisco, Cal.

My dear Mr. Boyd:

Yours of March 1st, with enclosure, was duly received, and I beg your pardon for the gross neglect I have given you, especially as you have always been so kind and upright with me in our

dealings with the Presidio business. I have now your second letter of the 18th instant. I had no adequate excuse for my neglect, but will explain that when your first letter was received the slump in the stocks of railways and industrials was in progress and as Mrs. Orndorf, who lives with me, and I have a great deal invested in that line we did not feel like taking any action until we saw how that matter was coming out, which is still in agitation. Then comes the great political excitement, which will probably keep the financial matters in a turmoil for the next year; then comes the silver slump, so we did not feel like joining you in the cyanide proposition and do not yet.

Of course you know more about such matters than I do, but it seems that it would be rather risky to put $70,000 in the business as it stands now. I suggest that it would be better to shut down for at least a year; discharging all employes save two or three inexpensive men to watch the property; sell off all the transportation property and other property that is expensive to maintain and await for future developments. If the country settles down to the business basis of a year ago and silver rises to, say 60 cents, I think we might start the cyanide process up at the mine, as you suggest in your last letter, saving the expensive transportation.

Thanking you for your kindness and regretting that I had neglected you so long, I am,

Yours very truly.

ANSON MILLS.

COMPLAINANTS' EXHIBIT 27 (Tr. 1071).

Presidio Mining Co.,

San Francisco, January 30, 1913.

Mr. Wm. S. Noyes, Supt.,

Shafter, Texas.

Dear Sir:

This is to advise you that we have today written to the San Antonio National Bank that we intended to close our account with them. The reason we assigned was that it was far more convenient for us to do business through Marfa and we took occasion to thank the San Antonio National Bank for their attention to our business in the past.

I also take occasion to advise you that at a meeting held on January 29th the directors of the company passed a resolution authorizing you, as superintendent, to borrow money upon the credit of the company up to the sum of $15,000 and at the most advantageous rate of interest you could obtain, not exceeding 8%, for the purpose of remodeling the company's plant, which resolution appears upon the company's minutes.

Yours very truly,

(Sgd.) B. S. Noyes,

President.